No. 93-444

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITIES OF PALO ALTO, REDDING, ROSEVILLE, BIGGS AND GRIDLEY, CALIFORNIA, AND PLUMAS SIERRA RURAL ELECTRIC COOPERATIVE, INC.,

Petitioners,

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, WESTERN AREA POWER ADMINISTRATION OF THE DEPARTMENT OF ENERGY, AND WILLIAM CLAGETT, ADMINISTRATOR OF THE WESTERN AREA POWER ADMINISTRATION,

ARVIN-EDISON WATER STORAGE DISTRICT; BANTA-CARBONA IRRIGATION DISTRICT; BYRON-BETHANY IRRIGATION DISTRICT; GLENN-COLUSA IRRIGATION DISTRICT; JAMES IRRIGATION DISTRICT; SAN LUIS OBISPO WATER DISTRICT; WEST SIDE IRRIGATION DISTRICT; TRINITY COUNTY PUBLIC UTILITIES DISTRICT; HAYFORK VALLEY PUBLIC UTILITY DISTRICT; CALAVERAS PUBLIC POWER AGENCY; TUOLUMNE COUNTY PUBLIC POWER AGENCY; BUREAU OF ELECTRICITY OF THE CITY OF ALAMEDA; AND THE CITIES OF LODI, LOMPOC, UKIAH AND HEALDSBURG, CALIFORNIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the appellate court in reversing the decision of the district court with respect to the meaning of the term "nonwithdrawable" as used in a settlement agreement improperly applied the "clearly erroneous" standard of review of Rule 52(a) of the Federal Rules of Civil Procedure by failing to give proper deference to the district court's findings of fact, weighing the extrinsic evidence *de novo*, disregarding evidence contradicting the appellate court's findings of fact and conclusions of law, and substituting the appellate court's judgment for that of the district court based upon the appellate court's findings of fact and conclusions of law that are erroneous.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cities of Palo Alto, Redding, Roseville, Biggs and Gridley, California, and Plumas Sierra Rural Electric Cooperative, Inc. ("Cities") respectfully request that a writ

of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed January 28, 1993.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the Appendix (concurrently filed herewith) as Appendix A at pages 1a to 15a, and is reported in 984 F.2d 1008 (1993). The order of the Ninth Circuit denying Cities' petition for rehearing and rejecting the suggestion for rehearing *en banc*, filed June 23, 1993, is printed as Appendix B at page 16a. The findings of fact and conclusions of law of the United States District Court for the Northern District of California, filed August 20, 1990, are printed as Appendix C at pages 18a to 30a.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.) provides:

> ". . . Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

Section 4 of Trinity River Division, Central Valley Project, Act of August 12, 1955, ch. 872, 69 Stat. 719 (Appendix D at page 31a) and Section 203 of the Flood Control Act of October 23, 1962, Public Law 87-874, 76 Stat. 1173 (Appendix E at page 33a).

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[1] The names of all parties to the proceeding appear in the title of the case.

STATEMENT OF THE CASE

This proceeding is a phase of a lawsuit begun in July 1975 by the City of Santa Clara ("Santa Clara") challenging the lawfulness of the Bureau of Reclamation's ("Bureau")[2] reduction of Santa Clara's contract rate of delivery by withdrawal of its allocation of Central Valley Project ("CVP") power and the refusal to grant Santa Clara the "same kind of allocation that Palo Alto,Redding and SMUD [Sacramento Municipal Utility District] had."[3] (A.E.R.47[4]; material in brackets supplied). Santa Clara's initial 75 mw allocation of CVP power was subject to withdrawal for the needs of the customers to which the power was previously allocated but was presently unused by them, for project use[5] and for the first preference of Trinity County[6] (A.E.R.190,193).

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[2] The Bureau was the Department of Interior's marketing agent for the sale of power and energy from the CVP until October 1977, when the Department of Energy was created and the marketing functions of the Bureau were transferred to Western Area Power Administration ("Western"). 42 USC §7152(1)(E). Hereinafter "Western" refers to the Bureau and to Western. Reference to events prior to October 1977 involve the Bureau and since October 1977 involve Western.

[3] SMUD's allocation of 290 mw, as conceded by Western, is not subject to withdrawal for any reason. Western's General Counsel Hine and its Mr. Magaw testified the allocation is, therefore, properly described as "nonwithdrawable" (RT92-93, 7/19/90; RT184,7/23/90). Since 1967, the CVP power allocations of Palo Alto, Redding, Roseville, Biggs, Gridley and Plumas Sierra, known collectively as the "load growth" customers (*infra*, 16), were also "nonwithdrawable", and were so regarded by Santa Clara. Santa Clara was seeking a "nonwithdrawable" allocation of CVP power in its lawsuit.

[4] "A.E.R." refers to Appellees ["Cities"] Excerpt of the Record before the appellate court.

[5] "Project use" refers principally to the power used to operate CVP pumping facilities, but also includes power plant use for lighting and other uses, such as for employees' living quarters (RT46-47,7/23/90; Hood Depo, p. 13).

[6] The statute authorizing construction of the Trinity River Division generating plants granted a first preference to the preference customers in Trinity County, subject to certain conditions, of up to 25 percent of the power generated. 69 Stat. 719 (Act of August 12, 1955) (Appendix D at 31a).

By 1971, when Santa Clara's contract rate of delivery (or "CRD")[7] was at 120 mw, Western began withdrawals. When Santa Clara's CRD was reduced by withdrawals to 71.4 mw, Santa Clara filed its lawsuit. The district court granted and denied in part cross-motions for summary judgment and remanded the case to the Secretary of Interior for the promulgation of rules and procedures for the marketing of CVP power (App.C at 19a; *City of Santa Clara v. Kleppe*, 418 F.Supp. 1243 (N.D.Cal.1976), reversed and remanded, Santa Clara v. Andrus, 572 F.2d 660 (1978).

On cross-appeals to the Ninth Circuit, that court held, *inter alia*, that the Secretary's discretion with respect to the allocation of CVP power was not reviewable. The Ninth Circuit ruled, however, that the sale of power to Pacific Gas & Electric Company ("PG&E"), a non-preference entity, was unlawful if there is a preference entity ready, able and willing to use that power because the statute governing the disposition of CVP power mandates such a preference (43 U.S.C. §485h(c)).[8] The Ninth Circuit returned the case to the district court to determine whether Santa Clara met these criteria for purchase of the power sold to PG&E. *City of Santa Clara v. Andrus*, 572 F.2d 660, 672, 677 (9th Cir. 1978), *cert. denied*, 439 U.S. 859, 58 L.Ed.2d 167 (1978).

Cities participated in the Ninth Circuit as *amici curiae*, supporting reversal of the district court's ruling on reviewability of the Secretary's actions.[9] On remand to the district court, Cities were granted intervention.

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[7] CRD is the maximum amount of power the customer is entitled to receive (RT159-160,7/23/90).

[8] Section 485h(c) provides that a "preference shall be given to municipalities and other public corporations or agencies; and also to cooperatives and other nonprofit organizations financed in whole or in part by loans pursuant to the Rural Electrification Act of 1936 [7 U.S.C.A. §901 et seq.]."

[9] In a pleading filed in the Ninth Circuit in 1978, when no issue as to the status of Cities' allocations of CVP power was involved, Cities described their CVP allocations of power as "permanent allocations, i.e., are not subject to withdrawal" (A.E.R.118).

Following the remand, negotiations were undertaken to settle the litigation.[10] Santa Clara insisted upon a "non-withdrawable" allocation such as Cities had. Cities' "non-withdrawable" load growth allocations were the only source of such an allocation. Cities agreed to relinquish part of their valuable load growth allocations provided Western agreed to divide Cities' remaining load growth, which was allocated to Cities as a group, into specific allocations of load growth for each city. Thereby each city would acquire certainty as to a specific level of load growth. Western agreed to Cities' proposal. Cities then negotiated a 65 mw allocation for Santa Clara. Thereafter, Santa Clara and PG&E agreed on a division of the escrow fund which had accumulated during the litigation.[11] Western, in turn, reached agreement with PG&E on Western's "wish list" which were all matters unrelated to the litigation. One such matter was an increase in PG&E's contractual obligation to support a simultaneous demand of all customers from 1050 mw to 1152 mw, which would significantly increase the cost of CVP power to Cities and all other preference customers.[12]

A Memorandum Of Understanding ("MOU"), dated February 8, 1980, and a Mutual Release were agreed to. The MOU was approved by the district court which reserved jurisdiction to enforce the MOU in accordance with its terms. The present dispute arose when Western finally in 1985 tendered contracts purporting to carry out the terms of the MOU. Cities objected to the proffered provisions for withdrawal of Cities' allocations for project use and the first preference of the Counties of Trinity, Calaveras and Tuolumne on the ground that Cities' allocations under the

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[10] Concerned that the sales to PG&E in lieu of to Santa Clara could not be justified and worried about liability to Santa Clara in that event, Western pressed for settlement (A.E.R. 196-98).

[11] Santa Clara had paid the difference between the cost of PG&E power and CVP power into an escrow fund. The fund was $85 million.

[12] The additional 102 mw increase, which PG&E agreed to, would increase the cost of power to Cities' and all CVP customers by at least $1,698 million (P.E.No. 27, page numbered 14).

MOU are "nonwithdrawable", i.e., not subject to withdrawal for any reason. Palo Alto and, subsequently, Redding, Roseville and Plumas Sierra, filed applications with the district court for enforcement of the MOU in accordance with Cities' position. Western opposed the applications, claiming, as it had in the court litigation with Santa Clara, that "nonwithdrawable" power in the MOU means "firm" power (Orig. 1985 Record at 228).[13]

In an order of October 11, 1985, the district court ruled in Cities' favor that under the MOU Cities' allocations were not subject to withdrawal. Western appealed to the Ninth Circuit. Without reaching the merits, the Ninth Circuit remanded the case to the district court with instructions to admit Arvin Edison Water Storage District ("Arvin-Edison") which had participated in the appeal as an *amici curiae*, as an intervenor, to enable it to present evidence it claimed to have showing the district court's interpretation of the MOU was in error.[14] The district court admitted Arvin-Edison as an intervenor as well other irrigation districts, preference entities of the Counties of Trinity, Calaveras and Tuolumne, and five cities, identified in the title of this case, although they had no knowledge or evidence bearing on the meaning of "nonwithdrawable" in the MOU, had no participation in the negotiations, the preference entities for the three counties were not in existence at the time of the negotiations, and the five cities were not CVP

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[13] Firm power means power that is available to the customer on demand at all times during the contract term. *Glossary of Important Power and Rate Terms, Abbreviations, and Units of Measurement*, Federal Power Commission, 1965, pp. 1 and 13. In the litigation with Santa Clara, the Ninth Circuit also referred to "nonwithdrawable power" as meaning "firm power". 572 F.2d at 663. "Orig. 1985 Record" citation refers to Western's excerpts of record that were before the Ninth Circuit in *Santa Clara v. Herrington, et al.*, No. 85-2899,Ninth Circuit, which resulted in the Ninth Circuit's remand on procedural grounds. That record was incorporated by reference as part of the district court's trial record.

[14] The further proceedings before the district court revealed that Arvin Edison had no evidence of its own on the subject, notwithstanding its representation to the Ninth Circuit.

customers until years later (RT283,7/24/90; A.E.R. 5,6,7,14,16,18,23,29; CR.463,Jt.Pre-Trial Statement, Undisputed Facts, Nos. 9,10, p. 15). Following a four day trial, the district court issued Findings of Fact and Conclusions of Law sustaining for the second time Cities' position respecting the interpretation of "nonwithdrawable" as used in the MOU.

Western, and the intervenors supporting Western's position, appealed. On appeal the Ninth Circuit reversed the district court, violating Rule 52(a) of the Federal Rules of Civil Procedure, by substituting its judgment for that of the district court on the basis of its interpretation, which is erroneous, of the 1967 amendments to Cities' contracts and upon a series of findings and conclusions, all of which are erroneous and, as hereinafter shown, led the appellate court to an erroneous reversal of the district court.

REASONS FOR GRANTING THE WRIT

Decisions of this Court, reversing decisions of federal courts of appeal for their failure properly to comply with Rule 52(a) of the Federal Rules of Civil Procedure's "clearly erroneous" standard of review, emphasize the importance of adherence to the strictures of that rule. As this Court has stated, the considerations underlying Rule 52(a) are the demands of judicial efficiency, the expertise developed by the trial judges and the importance of first hand observation. *Anderson v. Bessemer City*, 470 U.S. 564, 574-75, 84 L.Ed.2d 518 (1985).

The appellate court's decision in this case is a particularly egregious failure to adhere to the strictures of Rule 52(a) as enunciated by this Court. Not only has the appellate court failed to give proper deference to the district court's findings of fact, but, in second guessing the district court, the appellate court engaged in *de novo* review of the extrinsic evidence, disregarded all extrinsic evidence that undermined its analyses, substituted its judgment for that of the trial court as though the appellate court were the trial court, and contrary to law has reversed the district court

on the basis of the appellate court's findings of fact and conclusions of law that are clearly erroneous and led it into error.

The consequences of the appellate court's errors and reversal portend severe consequences for Cities and their consumers. App.K at 60a. In agreeing to give up 65 mw, having a minimum value of $100,000,000 over their contract's remaining years, which 65 mw Cities were in no danger of losing, Cities made possible the settlement of the original litigation. Cities only *quid pro quo* therefor were the specific allocations of power for each of Cities. Western's Administrator, in hailing the settlement with praise for Cities in making settlement possible, described these allocations of power under the MOU as allocations Cities could "count on to meet future load growth." (A.E.R. 205,211).

The appellate court's reversal deprives Cities of that only benefit and subjects their power allocations to reduction or elimination through withdrawal in contradiction of Western's commitment and of the MOU to "nonwithdrawability" of Cities' load growth allocations.

The appellate court's decision confronts the Cities and its customers with significant costs of replacement power. Palo Alto and its consumers, for example, face estimated cost increases of $169 million for the remaining period of the contract, 1994 through 2004.[15]

I. THE APPELLATE COURT VIOLATED THE "CLEARLY ERRONEOUS" STANDARD OF REVIEW BY SUBSTITUTING ITS JUDGMENT ON ERRONEOUS FACTUAL DETERMINATIONS AND CONCLUSIONS OF LAW FOR THE TRIAL COURT'S WELL-SUPPORTED FINDINGS AND JUDGMENT

Findings of fact, as the appellate court acknowledged, are "reviewed under the clearly erroneous standard." (App.A at 9a). Decisions of the Supreme Court and of the

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[15] Appendix K at 60a provides the estimated increased cost of power for each of Cities and other data respecting Cities.

Ninth Circuit emphasize that this standard "plainly does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573, 84 L.Ed.2d 518, 528(1985); *Amadeo v. Zant*, 486 U.S. 214, 223, 100 L.Ed.2d 249, 260-61(1988); *Magna Weld Sales Co. v. Magna Alloys & Research PTY, Ltd.*, 545 F.2d 668, 671(9th Cir. 1976); *Pullman-Standard v. Swint*, 456 U.S. 273, 287, 72 L.Ed.2d 66,78(1982). The appellate court's function is not to decide factual issues *de novo*. (*Anderson, supra*, at 573). The standard is a "deferential standard", which means that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (*Anderson, supra*, at 574; *United States v. Babbs*, 483 F.2d 308, 312 (9th Cir. 1973)). "This is so even when the district court's findings do not rest on credibility determinations, but are based on physical or documentary evidence or inferences from other facts." (*Anderson, supra*, at 574). "The rationale for deference to the original founder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility." *Anderson, supra*, at 574. The major role of the trial judge is the determination of fact and with experience in fulfilling that role come expertise. Id; *In re James E. O'Connell Co., Inc.*, 799 F.2d 1258, 1260-61(9th Cir. 1986). As *Komie v. Buehler Corp.*, 449 F.2d 644, 647(9th Cir. 1971), ruled,under the "clearly erroneous" standard of review, the appellate court—

> "must view the evidence *in the light most favorable" to the prevailing party and "such a party must be given the benefit of all inferences that may reasonably be drawn from the evidence*" (citation omitted; emphasis supplied)

See also *United States v. Babbs, supra*, at 312.

The appellate court's decision, which includes little or no discussion of the relevant evidence on which the district court rested its interpretation of "nonwithdrawable", or of any of the extrinsic evidence, discloses that the appellate

court set aside the district court's findings of fact without determining them to be "clearly erroneous", and substituted its own fact determinations and conclusions of law, which as shown hereinafter are erroneous.

The district court found the evidence inconclusive with respect to the status of Cities' allocations under the 1967 amendments of Cities' 1963 contracts. Cities contended their allocations of power became "nonwithdrawable", as a result of the 1967 amendments to Cities' contracts which amendments fulfilled Western's commitment to Cities in 1964, *infra*, 16-18. On the other hand, Western contended the 1967 amendment made Cities' allocations of power subject to withdrawal for project use, the first preference of Trinity, Calaveras and Tuolumne Counties, and for load level protection, referred to as "the three stated purposes". The district court found it unnecessary to determine conclusively which interpretation of the 1967 amendment was correct, finding that the 1967 amendments were reasonably susceptible of either interpretation (App.C, at 24a-25a).

The district court on the evidence rejected Western's attempt to sustain its position by asserting that "nonwithdrawable" as used in the MOU is a term of art, which through custom and usage meant subject to withdrawal for the three stated purposes.[16] The district court found "de-

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[16] At all times before the district court, Western contended that the three stated purposes were withdrawals for project use, the first preference of preference customers in the Counties of Trinity, Calaveras, and Tuolumne, and load level protection, asserting that *all* Western contracts subjected the allocations to withdrawal for these three purposes. Contradicted by the extrinsic evidence and admissions of its own witnesses on cross-examination that in no contract were power allocations subject to withdrawal for the three stated purposes and that in some contracts the allocations were not subject to withdrawal at *all*, Western changed its contention at the appellate level. It there contended that *all* contracts provided "in one form or another" for withdrawal of project use and for first preference entitlements of entities "in *one* or *more* of the counties of origin." (emphasis supplied). Even as modified the argument is false. Allocations are not subject to withdrawal in all contracts and the customers are properly described as having "nonwithdrawable" allocations (infra, 11, 24-25).

terminative" that "nonwithdrawable" was not a term of art and that before and during the negotiations of the MOU "there was no established meaning of the word 'nonwithdrawable' different from the ordinary meaning one would impart to the word, i.e., not withdrawable for *any* reason" (App.C, at 25a; emphasis the district court's). The district court further found (App.C at 25a) that "[i]f . . . nonwithdrawable was intended to mean not subject to other CVP customer's [needs] but subject to withdrawal for the three stated purposes, the MOU would have included a definition clearly expressing this meaning because the evidence presented to the court does not establish the word had acquired this special meaning through custom and usage." That decision was soundly based on the admissions of Mr. Hine (Western's General Counsel) and of Mr. Magaw (formerly a Western Staff Attorney and at trial the Assistant Area Manager for Power Marketing) that "nonwithdrawable" correctly describes an allocation not subject to withdrawal for any reason, such as SMUD's 290 mw allocation, concededly not subject to withdrawals (RT92-93,7/19/90; RT156,295,7/23,24/90). If "nonwithdrawable" were a "term of art", Mr. Hine agreed, "nonwithdrawable" should have been defined in the MOU (RT15-16,7/20/90). In the absence of a definition of a term claimed to be a "term of art", he agreed that the reasonable inference is that the term was being used in its common and ordinary sense (RT16,7/20/90) and that it is normal practice in the absence of a definition to ascribe that meaning to "nonwithdraw.able" (RT21-22,7/20/90). On this testimony alone the district court's finding that "nonwithdrawable" was used in its common and ordinary sense required affirmance as not "clearly erroneous". Moreover, as the district court also found, if "nonwithdrawable" were ambiguous, the result would be the same since under California law the contract should be interpreted most strongly against Western, the cause of the ambiguity (App.C at 29a, Finding of Fact 11). The appellate court ignored these factual findings and conclusions and this important principle of California law (Cal. Civil Code §1654), although declaring "nonwithdrawable" to

be ambiguous (App.A at 10a). If, as the appellate court asserted, "nonwithdrawable" is ambiguous, the appellate court erred in reversing the district court and misapplied Rule 52(a), for where there are two permissible views of the evidence, the factfinder's choice between them cannot be "clearly erroneous". *Anderson*, *supra*, at 574.

Coupled with the testimony of Western's Hine and Magaw, and the undisputed evidence (Magaw Depo. 103-106, 8/2/89) that "nonwithdrawable" had never been used by Western in any of the CVP contracts or in any internal memoranda or correspondence to describe either the contract or the power allocation (RT15,7/20/90; A.E.R. 2,20,37,51-66,227-235; Magaw Depo. 100, 8/2/89), the district court's findings of fact and conclusion of law interpreting the MOU were fully supported and should have been affirmed. These findings were entitled to, but did not receive, deference from the appellate court. Nor did the appellate court, in conflict with decisions of this Court and of its own circuit, view the evidence in the light most favorable to Cities, the prevailing party, and give Cities the benefit of all inferences that may reasonably be drawn from the evidence. *Komie v. Buehler Corp.*, *supra*. Instead, the appellate court reversed the decision of the district court based on erroneous findings and conclusions of law and the substitution of its judgment for that of the district court in violation of Rule 52(a).

The appellate court recognized that the "interpretation of contracts under California involves a complex interplay of questions of fact and questions of law" and that the trial court's findings of fact themselves involved in that "complex interplay" are "reviewed under the clearly erroneous standard" (App. A at 9a). Yet, the appellate court in disregard, of and in conflict with, decisions of this court and of the Ninth Circuit, proceeded as though the district court's findings of fact were a nullity because, it asserted, under California law interpretation of a contract is a matter of law. But that does not tell the whole story under California law. Where extrinsic evidence has been properly admitted, as the district court found (App.C at 22a), and the evidence

is in conflict, as in the present case, any reasonable construction (of the MOU) by the trial judge will be upheld under the general rule of conflicting evidence. See Witkin, Summary of California Law, 9th Ed. 1987, Contract §681, at 615, citing *Parsons v. Bristol Dev. Co.*, 62 C.3d 861,866, 44 C.R. 767, 402 P.2d 839 (1965) and *Los Banos Gravel Co. v. Freeman*, 58 C.A. 3d 785, 791, 130 C.R. 180. See also *In re James E. O'Connell, Inc.*, supra, at 1260-1261, ruling that findings of fact "underpinning" the matter of law "will not be overturned unless they are clearly erroneous."

As is clear from the analysis of the appellate court's opinion that follows herein the appellate court has violated Rule 52(a) by ignoring the highly deferential standard of review for findings of fact, by second guessing the district court on the basis of erroneous findings of fact and conclusions of law, and overstepping the bounds of its duty in undertaking to duplicate the role of the district court. *Anderson, supra*, at 573. It is not enough that the appellate court might give the facts another construction, resolve the ambiguities differently, and reach a different conclusion from that of the trial judge, for such a conclusion on the appellate court's part does not make the district court's findings "clearly erroneous." *Strickler v. Pfister Associated Growers, Inc.*, 319 F.2d 788, 790 (6th Cir. 1963); *Anderson, supra*, at 573-574.

II. THE APPELLATE COURT'S REVERSAL OF THE DISTRICT COURT IN VIOLATION OF RULE 52(a) IS BASED ON A MISINTERPRETATION OF THE 1967 AMENDMENTS AND ON OTHER ERRORS OF FACT AND OF LAW

The appellate court's reversal of the district court's decision in violation of Rule 52(a) is based on a misinterpretation of Article 9(b) of the 1967 amendments of Cities' contracts and on other errors of fact and of law. Dismissing the significance of the use of "curtailment" instead of "withdrawal" in Article 9(b) with the bald, unsupported assertion that "curtailment" and "withdrawal" have "the same practical effect" (App.A at 13a, note 4), the appellate

court found that the language of Article 9(b) of the 1967 amendments "is not ambiguous" and is a "straightforward recital of the three stated purposes", authorizing "withdrawal" of Cities' allocations and the allocations of all preference customers in the event power is *insufficient* to serve Cities' load growth (App.A at 12a).

In one sentence, set forth in the footnote,[17] the appellate court presumed to find authority to withdraw Cities' allocations for load level protection.[18] In another sentence set forth below,[19] the appellate court presumed to find authority to withdraw the allocations for project use and the first preference of Trinity, Calaveras and Tuolumne. The appellate court also presumed to find that the district court erred in finding the language of the 1967 amendments reasonably subject to the interpretations of either Cities or Western, asserting that there "is no relevant extrinsic evidence in the record that could alter the meaning of the 1967 amend-

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[17] "To the extent that power and energy is available, said contract rate of delivery shall be increased from time to time to serve the firm load growth of the Contractor [customer] up to the level which the Contractor's firm load reaches in 1980 or until the firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts." (material in brackets supplied).

[18] "Load level protection" refers to the maintenance of deliveries of power to the preference customers within the successive levels of PG&E's obligation under Contract 2948A to provide power to the preference customers sufficient to meet their CRDs, not to power in excess of the CRDs (P.Ex.No.42,pp.17-18).

[19] "The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is not required for project operation or for sale either under Section 4 of the Act of August 12, 1955 (69 Stat. 719), or under that portion of Section 201, Title II of the Act of October 23, 1962, pertaining to the San Joaquin River Basin (76 Stat. 1191-1192) as supplemented by power and energy from such other sources as the United States may in its sole discretion provide." The Acts referred to in the quoted definition confer a first preference on preference customers in Trinity, Calaveras and Tuolumne Counties of up to 25 percent of the additional energy generated by the Trinity River Division and New Melones power plants.

ments." (App.A at 13a). The appellate court's findings and conclusions are erroneous.

The appellate court completely misinterpreted Article 9(b) of the 1967 amendments of Cities' contracts. First, "curtailment", is the term used in Article 9(b), not "withdrawal". They do not have the same practical effect as asserted by the appellate court and are not interchangeable as the appellate court assumed. Second, the sentence interpreted by the appellate court as authorizing withdrawals for load level protection has no connection with load level protection and does not authorize withdrawals or curtailments for load level protection or for any other purpose. Third, the sentence relied on by the court as authorizing withdrawals for project use and the first preference of the three counties does not authorize such withdrawals. At least 20 CVP contracts, (identified in App.G at 38a) as hereinafter shown, *infra*, 21-22, lay bare the appellate court's error. The appellate court, also, made a series of erroneous findings of fact and conclusions of law which, unquestionably, contributed to, and made inevitable, the appellate court's erroneous interpretation of Article 9(b) (infra, 24-26). The appellate court's misinterpretation of the 1967 amendments, is also attributable to the appellate court's failure to give heed to the reason for the 1967 amendments, which precludes withdrawals of Cities' allocations (infra, 15-18). The appellate court's decision is barren of any reference to, discussion of, or awareness of, the significance of the reason for the 1967 amendments, described immediately below.

A. Background of the 1967 Amendments

The 1967 amendments had their genesis in 1964. At that time, Western was seeking authority from Congress to construct an extra high voltage ("EHV") transmission facility, known as the Intertie, over which power would be imported from the Pacific Northwest into Northern California to enable Western to increase its sales of power to CVP preference customers. The California Congressional delegation testified before a committee of Congress in opposition to

construction of the Intertie unless Western agreed to provide Cities' future load growth (RT17-18,198,7/23/90; A.E.R. 107; Ex. No. 18, p. 6). Confronted with this opposition, Western agreed to provide Cities' future load growth.[20] (id.)

To carry out the agreement, Western did two things. First, it estimated Cities' future load growth and increased the proposed capacity of the Intertie to enable delivery of that load growth until the maximum simultaneous demand of all CVP customers reached 1050 mw, then (in 1964) anticipated to be reached in 1980 (RT17-18,7/23/90).[21] The estimate of the anticipated 1050 mw included the loads of all of the preference customers, including Cities, *but provided load growth only for Cities and Shasta*[22] (RT133-134, 7/19/90; RT17-19,7/23/90). Second, to insure its ability to carry out its commitment to Cities (thereafter, and still, known as "the load growth customers"), Western negotiated a new support contract with PG&E (Contract No. 2948A) in which PG&E agreed to provide the power required by Cities' and the other preference customer's CRDs until the 1050 mw target was reached and, thereafter, at that level through December 31, 2004, the termination date of the contract (A.E.R.107).[23]

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[20] The term "load", is commonly used in the industry. It refers to the power requirements imposed on the seller's system by its customers. *PUR, Glossary for Utility Management*, Public Utility Reports, Inc. (1992) p. 84). Hence, reference to Cities' "load growth" referred to Cities' increasing load requirements for power as its consumers' "loads" increased.

[21] It is not surprising that an estimate of future load growth made in 1964, and peering 16 years into the future was "overoptimistic" about the level and time of Cities' load growth (P.Ex.No. 14, Memorandum of March 26, 1970, p. 1; Letter of April 27, 1990). As a Western witness wryly testified, referring to the "estimate in 1964 of what the loads were going to be in 1980", ". . . quite often we can estimate the loads next year."(RT18, 7/23/90). At the time of the negotiations the 1050 mw target had not been reached.

[22] Shasta Public Utility District is also a load growth customer.

[23] The appellate court has it backward when it states Cities' contracts were amended in 1967 when Contract No. 2948A was executed. That

Western's Mr. Hine testified (RT35,7/19/90) that the effect of the Intertie legislation enacted by Congress created a group of six customers, Cities, which were entitled to a block of power "*set aside* for that *group as a group* to grow into" until "the sum of those customers equaled the amount that was available," namely, 1050 mw (emphasis supplied). Normally, he testified, the contract is for a fixed amount of power, but Cities are an exception to that norm (RT39, 7/19/90), having, as another Western witness put it, a "special position as load growth customers" (RT17,7/23,/90).[24] Only Cities and Shasta, another Western witness testified, can be described as the "load growth customers entitled to load growth" because only their CRDs "increase *automatically* based on their load." (RT304,306,7/24/90; emphasis supplied). As a result of Western's commitment, "it became the Bureau's policy with respect to the CVP to reserve uncommitted power for the supply of load growth of the then municipal and cooperative preference customers of the project on a firm basis. *Prior to those customers needing the power it would be sold to others on a withdrawal basis*" (A.E.R. 107-108,P.Ex.No. 18).[25]

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contract was negotiated after Western made its commitment to Cities. Contract 2948A and the 1967 amendments to Cities' contracts were executed contemporaneously. That contract requires Western to deliver to PG&E all CVP power generated by its plants and the power imported over the Intertie from the Pacific Northwest *minus the power required for CVP project use* (Orig. 1985 Record, pp. 218-19; RT47, 7/23/90). Consequently, Western has not adopted procedures for withdrawals for project use. Western has stated that so long as it has surplus power in its accounts with PG&E under Contract 2948A or is able to buy power to meet deficits in CVP generation, there is little risk of the necessity for withdrawals for project use and has adopted no rules for such withdrawals (Orig. 1985 Record, p. 269).

[24] Santa Clara in its lawsuit referred to Cities as the "superpreference" customers by reason of their special status (A.E.R 105).

[25] Under the MOU, Santa Clara received not only a 65 mw "nonwithdrawable" allocation but, additionally, received a 60 mw "withdrawable" allocation from unused allocations, such as Cities' load growth, which would be withdrawn as needed by Cities. Santa Clara also had 71.4 mw of withdrawable power from its pre-litigation allotment which was withdrawable for the needs of other customers to which the power had been

Western's commitment to provide Cities' load growth mandated deletion of the provisions from Cities pre-1967 contracts authorizing withdrawals of Cities allocations for project use and the first preference of Trinity County. Obviously, if withdrawals were authorized, Cities would thereby be deprived of power for load growth and of power to meet its customers current requirements because withdrawals permanently reduce the CRDs, at odds with Western's commitment. Therefore, the authorizations for withdrawal were deleted by the 1967 amendments. The appellate court's decision does not address the evidence relating to the 1967 amendments and never attempts to, and if it had, could not square its interpretation of Article 9(b) with Western's load growth commitment to Cities.

Under the appellate court's interpretation of Article 9(b), the withdrawal authorizations were deleted from the 1963 contracts only to be immediately restored by the 1967 amendments in expanded form to include authority for withdrawal for Calaveras and Tuolumne. That makes no sense. As Western's witness agreed on cross-examination, if Cities' power allocations were to remain subject to withdrawal for project use and Trinity County's first preference and, additionally, were to be subject to withdrawal for the first preference of Calaveras and Tuolumne Counties, all that was necessary to accomplish that result was an amendment adding to the existing provision authorizing withdrawal for Trinity County the names of the other two counties (RT114-115,7/20/90).

B. Curtailment Versus Withdrawal

The appellate court's misinterpretation of Article 9(b) is, also, the result of the appellate court erroneously treating Article 9(b) as having used "withdrawal" rather than "curtailment" by wrongly concluding that both terms have the same "practical effect" (App.A at 13a, note 4). First, as Western's witness conceded, when "withdrawal" of power is authorized, the contract *always*, *without exception*, in-

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allocated but was unused, for project use and the first preference of only Trinity County (Orig. 1985 Record at 41-2).

cludes explicit provisions authorizing "*withdrawals*" stating the purpose of the withdrawal, the quantity of the withdrawal, and the advance written notice period that must be given before the withdrawal may be made (RT249-50, 7/24/90). Withdrawal is always referred to as "withdrawal", not as "curtailment". The witness could not recall a single contract where "withdrawal" is intended that does not include such explicit authority (RT251,7/24/90). In fact, the contracts tendered by Western to Cities in 1985, in purported compliance with the MOU, unlike the contracts as amended in 1967 which deleted all authority for withdrawals, included whereas clauses referring to the possibility of "withdrawals" and in the main body of the contract included explicit provisions authorizing "withdrawals" for project use and the first preference of the three counties, utilizing the term "withdrawal", not "curtailment" (Orig. 1985 Record, pp. 186-87; App.H(3) at 49a-50a). Contrary, also, to the appellate court's erroneous statement (App.A at 13a, n.4), that the contracts tendered to Cities in 1985 in purported compliance with the MOU provided for *pro rata* withdrawals, the contracts do not provide for withdrawals on a *pro rata* basis (Orig. 1985 Record, pp. 186-187,App.H(3) at 50a). In fact, none of Western's contracts in existence during the negotiations, provided for "withdrawals" on a *pro rata* basis.

Were "curtailment" and "withdrawal" synonymous, or of the same practical effect, one would expect to find in other Western contracts the use of "curtailment" when "withdrawal" is intended and vice versa, which is not the case.[26] The failure of the appellate court to recognize the distinction between "curtailment"and "withdrawal", which is obvious from the evidentiary record, is largely responsible for the appellate court's misinterpretation of the 1967 amendments, but as we show, *infra*,24-26,other erroneous findings of fact and conclusions of law by the appellate court on

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[26] P.Ex.No. 26, Vols. I and II includes copies of all CVP preference customer contracts in existence at the time of the settlement negotiations. Appendix J identifies the contracts in the order in which they appear in that exhibit.

the way to its misinterpretation of the 1967 amendments in violation of Rule 52(a) made inevitable the appellate court's erroneous interpretation of the provisions of Article 9(b) and the MOU.

"Withdrawal" is not "curtailment" and they do not have the same practical effect. Curtailment involves a "temporary diminution of service" in response to a temporary shortage of supply. *Arkansas Louisiana Gas Co.*, 49 FPC 53, 57 (1973), remanded on other grounds, *sub. nom., Arkansas Power & Light Co. v. FPC*, 517 F.2d 1223 (D.C. Cir. 1975), *cert.denied*, 424 U.S. 933, 47 L.Ed.2d 341 (1976). Curtailment involves a plan for allocating *insufficient* supplies among existing customers, usually *pro rata* in accord with priorities, usually providing the highest priority to residential customers. *International Paper Co. v. FPC*, 476 F.2d 121, 123 (5th Cir. 1973); *American Smelting & Refining Co. v. FPC*, 494 F.2d 925, 936 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882, 42 L.Ed.2d 122 (1974).[27] When the shortage is overcome, full contract rates of delivery resume *as required by the contractual obligations* which are temporarily put aside, not altered or extinguished by curtailment as they are in the case of withdrawals. In the case of a shortage of supply, necessitating curtailments, all customers suffer temporary diminution of power deliveries regardless of their contractual immunity from withdrawals. Thus, as Western's Mr. Magaw testified (RT202,7/23/90), even SMUD's 290 mw, concededly not subject to "withdrawal" for any reason, is subject to "curtailment". This is not the case with respect to "withdrawals". Only those preference customers whose contracts expressly subject the allocations to withdrawal are affected by withdrawals.

"Withdrawal" is permanent, not temporary, as in "curtailment." Withdrawal reduces the allocation of power and,

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[27] The cited cases are not distinguishable because the curtailments were due to shortages of natural gas whereas CVP curtailments are due to a shortage of power, particularly hydrogenerated, due to drought, or to the result of failure of generation and/or transmission facilities due to earthquakes or other forces.

consequently, the contract rate of delivery stated in the contract. This effect is illustrated by the withdrawals from Santa Clara that generated the 1975 Santa Clara lawsuit.[28] *supra*, 4. Amendments to the contract are submitted by Western to the customers to reflect this effect. Santa Clara consistently refused to sign them prior to its lawsuit.

The General Power Contract Provisions, which are part of Cities' contracts as amended in 1967, leave no room for doubt that "curtailment" is not "withdrawal", in practical effect or otherwise, contrary to the appellate court's assertion and Western's own position. "Paragraph K, Adjustments for Curtailments of Service", provides for billing adjustments in the event of curtailment of service and states in the clearest, non-ambiguous possible terms that "withdrawal of power and energy under contract provisions shall *not* be deemed curtailments to service." (App.F at 36a-37a, emphasis supplied). There are no billing adjustments for withdrawals.

C. The Definition of Total Power and Energy Available

The appellate court also erred in finding that the definition of "total power and energy available to serve the total firm load of all preference agencies" is a "straightforward recital" of two "of the three stated purposes," i.e., authorizing withdrawals for project use and the first preference of the three counties (App.A at 12a-13a). That this analysis of Article 9(b) of the 1967 amendments is erroneous is confirmed by at least 20 contracts in the evidentiary record which Western's witness conceded include a definition similar in format to that in the 1967 contracts (RT361-2; App.G at 38a-39a). The provision, in words and substance, is the same as the provision in Article 9(b) on which the appellate court relied for its erroneous interpretation and substituted its judgment for that of the district court. To illustrate, using Article 11(b) of Western's contract with the

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[28] See, also, the 1965 contract tendered by Western to Cities in purported compliance with the MOU (App.H(3) at 50a-51a). Section 13(d) acknowledges that withdrawals reduce the CRDs (Orig. 1985 Record, p. 187).

Atomic Energy Commission for service to its Lawrence Livermore Laboratory, one of the 20 contracts, dated August 28, 1973, the contract provides at page 5:

> "Power and energy delivered to AEC hereunder is part of the power and energy generated at Project generating plants, as supplemented by power and energy from such other sources as Reclamation may provide, which is not required for project operation or to supply preference customers in Trinity, Tuolumne and Calaveras Counties, California in accordance with the requirements of Reclamation Law."

Immediately following this language, Article 11(b) includes explicit provisions authorizing "withdrawals" for project use and the first preference of Trinity County, as Western's witness admitted (RT360-362,7/24/90; P.Ex.No. 26, Vol. II), as follows:

> The Contracting Officer [the individual executing the agreement on behalf of Western] upon 17 months advance written notice to the AEC may withdraw electric power and energy provided for hereunder up to 25 percent of the 22,800 kilowatt of power and energy from Trinity River Power Plants to supply preference customers in Trinity County . . . . Reclamation may also at the sole discretion of the Contracting Officer reduce the contract rate of delivery for power hereunder by any amount necessary to supply the project use requirements of the Central Valley Project, *Provided*, that Reclamation shall have given written notice to the AEC 17 months in advance of the effective date of such reduction in the contract rate of delivery. (material in brackets supplied).

Clearly, contrary to the appellate court's interpretation, the provision regarded by the appellate court as a "straightforward recital of" authority for withdrawal for project use and the first preference customer was not so regarded by Western. If it were that, the explicit provisions for withdrawal in the Atomic Energy Commission's contract and the 19 other contracts identified in Appendix G at 38a-39a

would have been unnecessary and would not have been included.

D. Load Level Protection

The appellate court also erred in interpreting the second sentence of Article 9(b), *supra*, p. 14, note 17, as authorizing withdrawals for load level protection. That sentence merely describes Western's commitment, made in 1964 and memorialized in Article 9(b) of the 1967 amendments, to provide Cities' load growth "up to the level which Contractor's firm load reaches in 1980 or until the firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts." (D.Ex.No. 502, p. 3). In stating that commitment Western prudently qualified the commitment with the phrase "[t]o the extent that power and energy is available". Although, under Contract 2948A PG&E is obligated to deliver power in sufficient amounts to satisfy Western's obligation to provide Cities' load growth, events beyond the control of either PG&E or Western, such as earthquake, drought, unscheduled failure of generating units or of transmission facilities, could bring about a temporary shortage of power,[29] which, through no fault of Western or PG&E, would prevent PG&E from fulfilling its obligation to provide power for existing CRDs and for load growth, requiring instead *pro rata* "curtailments"—not "withdrawals"—of power. The provision of Article 9(b) relied on by the appellate court serves that function.

When power is insufficient to meet the CRDs of all preference customers, load level protection is irrelevant and is of no concern. Load level protection is necessary only when the availability of power is sufficient to supply the CRDs and, additionally, is sufficient to enable the customers to take power in excess of their CRDs. The appellate court overlooked that important fact. Moreover, when power is

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[29] Contract 2948A is critical to the functioning of the CVP. Without that contract, Western could only sell 450 mw on a permanent basis. It could not support a load of 1050 mw or the increase to 1152 mw provided in the MOU because Western does not have sufficient water at all times to meet that kind of an obligation (RT36,37,7/19/90).

available in sufficient volume to permit excess takes, the preference customer contracts, including Cities' contracts, did not provide for curtailments or withdrawals. They explicitly provided that nothing in the contracts authorizes the customer to take power in excess of the CRDs, and that if excess takes of power occurred, which caused Western to incur a liability as a result of the excess deliveries, the customer agrees to indemnify Western (D.Ex.No. 501, pp. 13 and 14).[30] That is the load level protection provision, not the sentence relied on by the appellate court. It does not authorize either withdrawals or curtailments.

Thus, it is abundantly clear that the appellate court erred in finding that the sentence is a straightforward recital of one of the three stated purposes, namely, load level protection. This error alone undermines the appellate courts' substitute conclusion for that of the district court in violation of Rule 52(a), that Article 9(b) is a straightforward authorization of withdrawal for the *three* stated purposes.

E. The Appellate Court's Additional Violations of Rule 52(a)

Based on a finding that *all* Western power contracts provide authority to withdraw for the three stated purposes, the appellate court erroneously concluded that the MOU, therefore, must have contemplated post-MOU sales contracts would so provide (App.A at 14a). All CVP contracts, however, do not provide for withdrawal for the three stated

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[30] Excess takes of power would cause a liability to PG&E only if they caused PG&E's deliveries of power to exceed the then effective PG&E support obligation. It is unlikely that such liability would occur unless there were excess takes of power by a multiple number of CVP customers which could push the effective simultaneous demand of all customers over PG&E's obligation. Mr. Hine acknowledged that load level protection is different in nature from project use and the first preference in that the simultaneous peak is not predictable. As a result, if that peak is exceeded it is known only weeks after the fact. Consequently, load level protection is handled after the fact. Mr. Hine was hard put to know how it would be handled since it had not occurred. He surmised it was a billing matter (RT114,117,7/19/90; P.Ex.No. 26, Vol 1, City of Palo Alto Contract, Art. 15, p. 13).

purposes, as Western's witnesses conceded when confronted with the contracts. SMUD's 290 mw, for example, is not subject to withdrawal for any reason (RT35, 7/20/90). An additional allocation of 70 mw made by Western to SMUD in 1966 is withdrawable only for project use and the first preference of only Trinity County (RT32-33,7/20/90; RT134-135,7/19/90). Additionally, other contracts contain no provisions for withdrawals, for example, Reclamation 2035 Contract (P.Ex.No. 26, Vol. II) and Arvin-Edison's contract(A.E.R.223-4, P.Ex.No.36 Vol. II). Further, no pre-MOU contract authorizes withdrawals for the three stated purposes. They provide for withdrawal for project use and only the first preference of Trinity County (P.Ex.No.26, Vol. I and II). This is but one of the appellate court's erroneous findings in violation of Rule 52(a) that led it into error in substituting its judgment for the district court's respecting the interpretation of the 1967 amendments and the MOU.

The appellate court also found that Western's ability to sell power is limited by the three stated purposes. This finding is erroneous. It led to the appellate court's erroneous conclusion that "one reasonably would expect the MOU to accommodate this reality", and its rejection, in violation of Rule 52(a), of the district court's determination (App.A at 10a). As Western's Mr. Magaw testified, Western has the authority, and has exercised it,to include some, none, or all of the three stated purposes in contracts, citing the total exemption from withdrawal of SMUD's 290 mw (RT178-179,7/23/90), Western's agreement to exempt 80% of the 65 mw allocation to Santa Clara in the MOU from any withdrawals (RT181-182,7/23/90),[31] and, by rule, West-

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[31] When a new agreement purporting to implement the terms of the MOU was tendered by Western to Santa Clara, Santa Clara objected to the provisions which authorized withdrawals of the 65 mw for the three stated purposes on the ground that under the MOU the 65 mw was not subject to withdrawal for any reason. Western contractually agreed that 80% of the 65 mw would not be subject to withdrawal for any reason, i.e., would be "nonwithdrawable" as described in the MOU(RT181-82,288, 7/24,25/90).

ern's exemption of 80% of all CVP preference customers allocations from any withdrawals. Mr. Magaw testified that Western has a variety of ways to meet the first preference and project use. (Id.) Further, nothing in the statutes authorizing the first preference specifies the manner in which the first preference is to be satisfied and does not mandate withdrawals therefor (App.D&E at 31a and 33a).[32]

Frequency of use in the MOU of certain terminology does not suggest a specialized meaning unique to the MOU, as the appellate court erroneously found, singling out "present nonwithdrawable customers" (App.A at 10a). "Nonwithdrawable" appears only 7 times, "present nonwithdrawable customers" appears only 5 times, and "withdrawable" appears most frequently, 16 times, all due simply to the organization of the MOU, as even a cursory examination of the MOU reveals. As for the appellate court's implication of significance in the use of "nonwithdrawable" in the phrase "present nonwithdrawable customers," (App. A at 10a), the significance is that, contrary to Western's contention that the phrase refers to all preference customers, only Cities and Shasta are identified as the "present nonwithdrawable customers" (E.R. at 141[33]), *as Western's Hine and Magaw conceded* (RT3-4,7/20/90; Magaw Depo.193-195).

In the Mutual Release, Santa Clara agreed not to challenge any future withdrawals of power from its withdrawable power allocations to satisfy the present nonwithdrawable CVP customers' contractual rights as set forth in Paragraph 8 of the MOU. That paragraph of the MOU identifies the contract rights of Cities and Shasta to purchase its allocations on a "nonwithdrawable" basis.

The result of the appellate court's second guessing of the trial court and violation of Rule 52(a) is startlingly and clearly erroneous. The appellate court, in effect, has ruled

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[32] The record discloses that the total power requirements of the first preference customers in the three counties even by 1985 was a mere 15.5 mw (Orig. 1985 Record, p. 264).

[33] "E.R." refers to Appellants Excerpts of the Record in the appellate court.

that "curtailment", "withdrawable" and "nonwithdrawable" all mean subject to withdrawal for the three stated purposes.

Cities submit that contrary to the appellate court's assertion (App.A at 13a) that there is no relevant extrinsic evidence in the record that could alter the appellate court's interpretation of the 1967 amendments, as shown herein, the relevant extrinsic evidence which contradicts this assertion is overwhelming.

III. UNDER THE APPELLATE COURT'S INTERPRETATION OF THE 1967 AMENDMENTS OF CITIES' CONTRACTS IN VIOLATION OF RULE 52(a) ONLY CITIES ARE WITHOUT ANY BENEFIT UNDER THE MOU, AND ARE SUBJECTED TO DETRIMENT

The appellate court rejected Cities' contention that Western's interpretation of the MOU, adopted by the appellate court, deprives only Cities of any benefit under the MOU and leaves Cities only with a detriment.[34] App.A at 14a. The alleged benefits described by the appellate court are non-existent. *Id.*

As one benefit, the appellate court asserts that Cities have the ability to grow into their allocations of power specified in the MOU without a wasteful race to compete for load growth that characterized the arrangement prior to the MOU (App.A at 14a). To speak of a race for load growth among Cities of diverse locations, size, population, and economic circumstances that bear on load growth is hyperbole. Under no circumstances could Biggs, for ex-

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[34] Santa Clara received a 65 mw allocation of power which under the decision of this Court (572 F.2d 660, 667-8 (1978)) it could not secure in the remand proceedings, the right to 60 mw of withdrawable power, and $10,000,000 of the escrow fund (Aghjayan Depo., pp. 83-84, 7/26/89). PG&E received $75,000,000 of the escrow fund and the right to continue to purchase surplus low cost CVP power without challenge from Santa Clara (Aghjayan Depo., pp. 85-86, 7/26/89). Western received an increase of 102 mw of support from PG&E under Contract 2948A which Western had wanted for its own benefit and secured PG&E's agreement to negotiate with Western the settlement of matters between them that Western wanted to settle, unrelated to the *Santa Clara* case.

ample, the smallest of the group, engage in a race for load growth with, for example, Roseville.[35] The reference to a race is colorful, but there was no race prior to the MOU, wasteful or otherwise, among Cities for load growth. There was recognition, however, that in light of the varying prospects for load growth, as is evidenced by the different amounts of load growth assigned in the MOU to Cities from the load growth remaining at the time of the negotiations, a specific allocation of power for load growth was advantageous. Finally, on this point, if the allocations are subject to withdrawal Cities cannot be secure that the respective allotments will be there to grow into at their own pace, as the appellate court assumed.

Another benefit perceived by the appellate court is based on its misreading of the 1978 decision of the Ninth Circuit in *Andrus*, *supra*. Under *Andrus*, the appellate court asserted, Western had complete discretion to sell all of Cities' allocations of power to other preference customers, leaving Cities without any CVP power. The appellate court concluded, on this reading of *Andrus*, that the MOU spared Cities the loss of all of their power allocations and instead granted Cities the right to "purchase *guaranteed* amounts of CVP power, subject only to the same withdrawals for the three stated purposes that characterized *all* of Western's typical pre-MOU sales contracts." (emphasis supplied; App.A at 14a). But *Andrus* did not rule that Western has complete discretion to deprive Cities, or any preference customer, of their right to the power committed under contract to them by Western. *Andrus* ruled only that Western has complete discretion to allocate power *contractually uncommitted* but available for allocation at Western's discretion (572 F.2d at 667, 668). Consequently, the appellate court in violating Rule 52(a), erroneously asserted that Cities were

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[35] Biggs' population is 1,679; its service area is less than 1 square mile. It has a total of 621 customers of which 575 are residential and the rest are small commercial customers. Roseville's population is 53,816, its service area is 29.2 sq. miles. In 1992-3 it had 24,597 customers of which 3,086 were commercial/industrial, some of which are very large, employing thousands (App.K at 60a).

spared the unfavorable outcome of loss of all of their CVP power. Cities existing allocations were not in jeopardy.

The appellate court also violated Rule 52(a) in asserting that Cities were awarded rights to purchase "guaranteed" amounts of power, while at the same time (App. A at 14a) asserting the power was subject to withdrawals for the three stated purposes. Power that is subject to withdrawal can hardly be described as "guaranteed" power. Nor can such power be described as power Cities could "count on", as Western in hailing the settlement described Cities' allocations under the MOU (A.E.R.205, 211). When allocations are subject to withdrawal, the preference customer's ability to plan its power needs and to market the power, particularly for industrial uses, is impaired. The ability to attract industrial customers, particularly, depends upon the sellers' ability to provide long term assurance to the industrial customer of the availability of the power and at an advantageous cost to the industrial customer.

The appellate court also wrongly concluded (App.A at 14a) that in all of Western's typical contracts the power allocations were subject to withdrawal for the three stated purposes. None of the 20 contracts provides for withdrawals for the three stated purposes nor, in fact, did any of the contracts that were in existence at the time of the negotiations (*supra*, 21-22, 25; P.Ex.No. 26, Vols. I and II).

In addition to depriving Cities of the only benefit Cities received in relinquishing 65 mw of Cities' load growth,which had a value of not less than $100,000,000[36] over the remaining 24 years of Cities' contracts, the appellate court ignored the detriment in increased cost of power to Cities because of Western's insistence that PG&E increase its support obligation by 102 mw to permit Western for its own purposes, admittedly outside of the issues of the lawsuit, to provide allocations of power to five cities that were not customers of Western and had agitated for CVP power

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[36] PG&E placed the value of the 65 mw at between $182 to $273 million (P.Ex.No. 23, p.2).

allocations. That increased cost of power, estimated at $1,698 million by Western's witness Hine will be borne, Mr. Hine stated, by existing CVP customers as well as new customers (P.Ex. No. 27, p. 14).

An interpretation of the MOU that has such irrational results and attributes such irrational conduct to Cities, leaving Cities only with detriment as its *quid pro quo* for relinquishing 65 mw of valuable load growth which Cities were not in jeopardy of losing, and making the settlement of the lawsuit possible, is untenable. Cities held the key to settlement. Cities would not have given up 65 mw without insisting that its allocations were not to be subject to withdrawal for any reason, even if its allocations were not already "nonwithdrawable" as they have been since 1967.

CONCLUSION

The appellate court's decision not only is riddled with errors of fact and of law, committed while violating Rule 52(a), it is, beyond argument, the decision is in conflict with decisions of this Court and of the appellate court's own circuit respecting the proper function of an appellate court under that rule.

The violation of Rule 52(a) has unjustly deprived only Cities of their only benefit of the settlement, and has sanctioned a breach of a solemn agreement made by Western in 1964, memorialized in the 1967 amendments, that Cities' load growth CVP power allocations would not be subject to withdrawal for any reason. That sole benefit were the specific allocations for each of Cities from their remaining nonwithdrawable load growth allocation. The benefit is denied Cities by the appellate court's ruling that Cities' allocations of power are subject to withdrawal for load level protection, project use and the first preference of those Counties, violates Rule 52(a), and does so on the basis of errors of fact and of law as shown in this petition.

Petitioners submit that their petition for a writ of certiorari should be granted and the decision of the appellate court, so clearly in violation of Rule 52(a), should be summarily reversed.

Respectfully submitted,

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September 20, 1993

No. 93-944

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITIES OF PALO ALTO, REDDING, ROSEVILLE, BIGGS AND GRIDLEY, CALIFORNIA, AND PLUMAS SIERRA RURAL ELECTRIC COOPERATIVE, INC.,

Petitioners,

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, WESTERN AREA POWER ADMINISTRATION OF THE DEPARTMENT OF ENERGY, AND WILLIAM CLAGETT, ADMINISTRATOR OF THE WESTERN AREA POWER ADMINISTRATION,

ARVIN-EDISON WATER STORAGE DISTRICT; BANTA-CARBONA IRRIGATION DISTRICT; BYRON-BETHANY IRRIGATION DISTRICT; GLENN-COLUSA IRRIGATION DISTRICT; JAMES IRRIGATION DISTRICT; SAN LUIS OBISPO WATER DISTRICT; WEST SIDE IRRIGATION DISTRICT; TRINITY COUNTY PUBLIC UTILITIES DISTRICT; HAYFORK VALLEY PUBLIC UTILITY DISTRICT; CALAVERAS PUBLIC POWER AGENCY; TUOLUMNE COUNTY PUBLIC POWER AGENCY; BUREAU OF ELECTRICITY OF THE CITY OF ALAMEDA; AND THE CITIES OF LODI, LOMPOC, UKIAH AND HEALDSBURG, CALIFORNIA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX

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APPENDIX A

United States Court of Appeals,
Ninth Circuit

No. 91-15168

CITY OF SANTA CLARA,
Plantiff-Appellee,

Cities of Palo Alto, Redding, Roseville, Biggs and Gridley; Plumas-Sierra Rural Electric Cooperative; and Shasta Dam Area Public Utility District,
Plaintiffs-Intervenors-Appellees,

v.

James D. WATKINS, Secretary of Energy, United States Department of Energy, Western Area Power Administration of the Department of Energy; and William Clagett, Administrator of the Western Area Power Administration,
Defendants-Appellants,

Arvin-Edison Water Storage District; Banta-Carbona Irrigation District; Byron-Bethany Irrigation District; Glenn-Colusa Irrigation District; James Irrigation District; San Luis Obispo Water District; West Side Irrigation District; West Stanislaus Irrigation District; Trinity County Public Utilities District; Hayfork Valley Public Utility District; Calaveras Public Power Agency; Tuolumne County Public Power Agency; Bureau of Electricity of the City of Alameda; and the Cities of Lodi, Lompoc, Ukiah and Healdsburg,
Defendants-Intervenors-Appellants.

Argued and Submitted April 16, 1992.
Decided Jan. 28, 1993.

Northern California city with had agreed to purchase hydroelectric power from federal reclamation project brought action for enforcement of memorandum of understanding (MOU) requiring tender of contracts incorporating city's interpretation of "nonwithdrawable." The United States District Court for the Northern District of California, Samuel Conti, J., entered judgment for city, holding that "nonwithdrawable" as used in MOU contained no exceptions allowing seller to withdraw power from its customers on pro rata basis if necessary to satisfy power demands of what parties referred to as "three stated purposes." Seller appealed. The Court of Appeals, Fletcher, Circuit Judge, held that: (1) "nonwithdrawable" was ambiguous, and (2) MOU contemplated that post-MOU sales contracts would contain withdrawal provisions for three stated purposes.

Reversed.

1. Electricity 11(3)

Under California law, "nonwithdrawable," as used in memorandum of understanding (MOU) which expressed parties' agreement to enter into contract for sale of power, was ambiguous; nothing in language of MOU required that "nonwithdrawability" be free of any and all exceptions, and on other hand, nothing in language of MOU required inclusion of provisions allowing utility to withdraw power from its customers on pro rata basis if necessary to satisfy power demands of what parties referred to as "the three stated purposes."

See publication Words and Phrases for other judicial constructions and definitions.

2. Electricity 11(3)

"Nonwithdrawable," as used in memorandum of understanding (MOU) concerning hydroelectric power allocated

to northern California cities, did not mean "nonwithdrawable for any reason," but rather, meant that allocations were subject to withdrawals for three stated purposes which were included in all pre-MOU contracts for sale of power; because all pre-MOU contracts contained withdrawal provisions for three stated purposes, MOU must have contemplated that post-MOU sales contracts would also contain those provisions, which were necessary to maintain seller's statutory and contractual obligations.

Margot de Ferranti (argued) and C. Max Vassanelli, U.S. Dept. of Justice, Washington, DC, for defendants-appellants.

Dian M. Grueneich, Grueneich, Ellison & Schneider, San Francisco, CA, for defendants-intervenors-appellants First Preference Customers.

Michael N. McCarty (argued) and Daniel C. Kaufman, Ritts, Brickfield & Kaufman, Washington, DC, for defendants-intervenors-appellants Irrigation Districts.

Robert A. O'Neil and John Michael Adragna, Miller, Balis & O'Neil, P.C., Washington, DC, for defendants-intervenors-appellants Five Cities.

Barry F. McCarthy, Duncan, Weinberg & Miller, Santa Clara, CA, for plaintiff-appellee.

Reuben Goldberg, Goldberg, Fieldman & Letham, Washington, DC, for plaintiffs-intervenors-appellees.

Appeal from the United States District Court for the Northern District of California.

Before: FLETCHER, POOLE, and BRUNETTI, Circuit Judges.

FLETCHER, Circuit Judge:

Appellants-defendants and appellants-intervenors-defendants (this court previously held them to have a right

to intervene as parties affected by the settlement) appeal the district court's order interpreting a settlement agreement between appellees-plaintiffs and appellants-defendants. At issue is a term in the settlement agreement that the parties neglected to define. The elusive term is "nonwithdrawable" as applied to hydroelectric power allocated to municipalities in northern California. Appellants[1] contend that "nonwithdrawable" is a term of art that incorporates three exceptions. Appellees[2] and the district court interpret the word to mean "not withdrawable for any reason." Our review of the contract, the extrinsic evidence presented to the district court and the statutory and contractual context of the negotiations lead us to REVERSE.

FACTS

This litigation concerns the allocation of hydroelectric power from a federal reclamation project. Details of the dispute as it developed from the early 1960's until 1978 are set forth in prior published opinions. *See City of Santa Clara v. Kleppe*, 418 F.Supp. 1243 (N.D.Cal.1976), *rev'd and remanded, City of Santa Clara v. Andrus*, 572 F.2d 660, 668 (9th Cir.) *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978). We summarize that history here.

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[1] Western Area Power Administration ("Western"); Arvin-Edison Water Storage District, Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, Glenn-Colusa Irrigation District, James Irrigation District, San Luis Obispo Water District, West Side Irrigation District and West Stanislaus Irrigation District (the "Irrigation Districts"); the cities of Alameda, Lodi, Lompoc, Ukiah and Healdsburg (the "Five Cities"); public utilities in Trinity, Calaveras and Tuolumne Counties (the "First Preference Customers"); and the Pacific Gas and Electric Company ("PG & E").

[2] The city of Santa Clara; the cities of Palo Alto, Roseville, Redding, Biggs, Gridley and the Plumas-Sierra Rural Electric Cooperative ("Cities"); Shasta Dam Area Public Utility District ("Shasta").

The Central Valley Project (CVP) is a multipurpose federal reclamation project consisting of dams, hydroelectric power plants, transmission lines, and irrigation canals. CVP's primary purpose is irrigation. However, the Reclamation Act of 1939 permits power generated beyond the needs of CVP to be sold or leased. Because CVP power is much less expensive than power purchased from private utilities, customers in Northern California compete vigorously for it. Western is the agency of the Department of Energy that oversees CVP and markets its power.

CVP expanded its generating capacity in the early 1960's, and made contracts to sell the power to numerous customers, including Shasta and Cities. The city of Santa Clara was not among the customers. When it tried to contract for power in 1965, it was informed that all anticipated power was committed to other customers. However, CVP did agree to sell some power to Santa Clara on a "withdrawable" basis. The amount of withdrawable power allocated to Santa Clara grew throughout the late 1960's, and the first withdrawals began in the 1970's.

Santa Clara brought suit in federal court, alleging (among other things) that by allocating "nonwithdrawable power" to some customers but not to Santa Clara, the Secretary violated the statutory command that in sales of CVP power "preference shall be given to municipalities and other public corporations or agencies" and REA cooperative, 43 U.S.C. § 485h(c). *City of Santa Clara v. Kleppe*, 418 F.Supp. 1243 (N.D.Cal.1976). On appeal, we held that the Secretary had unreviewable discretion to determine how allocations among preference customers were made. *City of Santa Clara v. Andrus*, 572 F.2d 660, 668, (9th Cir.), *cert. denied*, 439 U.S. 859, 99 S.Ct. 176, 58 L.Ed.2d 167 (1978). We also held, however, that the Secretary could not continue its practice of selling CVP power to PG & E, a non-preference customer, if a preference customer was willing and able to purchase it. The case was remanded for determination as to whether Santa Clara

was willing and able to buy power allotted to PG & E. *Id.* at 672. Both opinions used the terms "withdrawable" and "nonwithdrawable" but did not discuss whether the latter entailed the exceptions at issue in this case. *See Kleppe*, 418 F.Supp. at 1248 n. 14, 1255, 1259 n. 40, 1262; *Andrus*, 572 F.2d at 663-65, 668.

Extended settlement negotiations followed this court's remand of *Andrus*, and resulted in a Memorandum of Understanding (MOU) dated February 8, 1980. The MOU allocates 472.6 MW of CVP power among the customers that were parties to the *Andrus* suit. It is liberally sprinkled with the terms "withdrawable," "nonwithdrawable," "nonwithdrawable customers," "withdrawable power," and the like. Santa Clara, for example, has the right under the MOU to purchase 65 MW of CVP power "on a nonwithdrawable basis" and an additional 60 MW "on a withdrawable basis." MOU ¶6-7. Nowhere are these terms defined. The parties signed a Mutual Release of claims on August 29, 1980 that expressly incorporated the MOU. The district court approved the settlement and dismissed the lawsuit in an order dated October 3, 1980, but retained jurisdiction for the purpose of entering orders necessary to enforce compliance.

The MOU was not itself a contract for the sale of power; it was a contract to enter into such contracts. *See* MOU ¶24 ("The parties hereto agree to execute those new contracts and amendments to the contracts between any of them which are necessary to implement the commitments contained herein"). The current problem arose when Western sent contracts to individual customers to implement the commitments made in the MOU. The tendered contracts contained provisions allowing Western to withdraw power from its customers on a pro rata basis if necessary to satisfy the power demands of what the parties refer to as "the three stated purposes." Each of the three stated purposes has a statutory or contractual basis:

(1) "Project use" requirements of the CVP, i.e., the power CVP needs to operate its pumping, lighting, maintenance and other operations. Under CVP's enabling statute, the Reclamation Project Act of 1939, no contract for sale of power "shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes." 43 U.S.C. §485h(c). Only the surplus is available for sale.

(2) "First preference" customers in Trinity, Calaveras, and Tuolumne counties, the sites of two of CVP's dams. The statutes authorizing the construction of the Trinity River and New Melones projects require that Western devote up to 25% of the power from those projects to the "first preference" of certain customers in the counties where those projects are located. 69 Stat. 719 (Act of August 12, 1955); 76 Stat. 1173 (Act of October 23, 1962). Public utilities in Trinity, Calaveras and Tuolumne Countries (the "First Preference Customers") are the beneficiaries of this stated purpose.

(3) "Load level protection" that caps deliveries of CVP power at a maximum of 1050 MW. Hydroelectric plants are subject to dips in production. In order to maintain regular output, they require "firming energy" from an outside source. In 1967, PG & E entered into a long-standing contract ("Contract 2948A") to provide Western with up to 1050 MW of firming energy, an expansion from the previous 550 MW. Western's existing contracts with Cities were amended in 1967 to take advantage of the increased capacity.

When the MOU was drafted, the parties considered the possibility of withdrawals for the three stated purposes to be "scant" (to the extent they thought about it at all). Findings at 13. To date, there have never been withdrawals for the three stated purposes. No one knows for certain if withdrawals ever will be necessary, or how extensive they might be. Appellees nonetheless object to the with-

drawal provisions in the tendered contracts. They argue that their allocations of power under the MOU are not withdrawable for any reason. If it become necessary to withdraw allocations of power, Appellees contend, the burden should fall exclusively on those customers that have not contracted for "nonwithdrawable" power. These customers include Appellants Irrigation Districts and the Five Cities.

Appellees applied to the district court for enforcement of the MOU requiring tender of contracts incorporating their interpretation of "nonwithdrawable." The district court issued an order in their favor, holding that the word "nonwithdrawable" as used in the MOU contained no exceptions for the three stated purposes. *City of Santa Clara v. Herrington*, No. C-75-1574 SC (N.D.Cal. October 11, 1985). Arvin-Edison Water Storage District appealed to this court, complaining that it (along with the other Irrigation Districts, the Five Cities and any other preference customers that were not parties to the MOU) should have been allowed to intervene as affected parties. This court agreed, and remanded the case with instructions to permit intervention and to admit additional extrinsic evidence as to the meaning of the MOU. *Santa Clara v. Herrington*, 811 F.2d 1507 (9th Cir. 1987) ("*Remand Order*").

The district court held a four-day evidentiary hearing in July 1990. It held once again that the term "nonwithdrawable" as used in the MOU meant "not withdrawable for any purpose." *Santa Clara v. Watkins*, No. C-75-1574 SC (N.D.Cal. August 20, 1990) ("Findings"). This order is the subject of this appeal.

JURISDICTION

This court has jurisdiction over the district court's final order pursuant to 23 U.S.C. § 1291.

STANDARD OF REVIEW

The interpretation of contracts under California law involves a complex interplay of questions of fact and questions of law. The trial court must first decide whether the contested terms are ambiguous.

> Under California law, the determination of whether a written contract is ambiguous is a question of law that must be decided by the court. Even if the written agreement is clear and unambiguous on its face, the trial judge must receive relevant extrinsic evidence that can prove a meaning to which the language of the contract is "reasonable susceptible." If the court finds after considering this preliminary evidence that the language of the contract is not reasonably susceptible of interpretation and is unambiguous, extrinsic evidence cannot be received for the purpose of varying the terms of the contract. The case may then be disposed of by summary judgment[,] because interpretation of the unambiguous contract is solely a question of law.

Brobeck, Phleger & Harrison v. Telex Corp., 602 F.2d 866, 871-72 (9th Cir.) (citations omitted), *cert. denied*, 444 U.S. 981, 100 S.Ct. 483, 62 L.Ed.2d 407 (1979).

On appeal to this court, the district court's findings of fact themselves are reviewed under the clearly erroneous standard, but the principles of contract law applied to those facts are reviewed de novo." *L.K. Comstock & Co. v. United Engineers & Constructors, Inc.*, 880 F.2d 219, 221 (9th Cir. 1989). *See also Southland Corp. v. Emerald Oil Co.*, 789 F.2d 1441, 1443 (9th Cir. 1986) ("Under California law, the interpretation of a written contract is a matter of law for the court even though questions of fact are involved").

DISCUSSION

A. Is the MOU ambiguous?

[1] The district court examined extrinsic evidence as required by *Brobeck* and directed by this court in *Remand Order*. It concluded that the meaning of "nonwithdrawable" was "clear and unequivocal," and rejected the possibility that it was ambiguous. Findings at 16. This conclusion of law was erroneous.

The MOU nowhere defines its terms. It includes a number of references that can be understood only by going outside the four corners of the document: "load growth", "maximum simultaneous demand", "contract rate of delivery" and so on. The frequency with which "nonwithdrawable" appears, and particularly in its repeated use in the phrase "present nonwithdrawable customers", suggests that it also may have a specialized meaning unique to the MOU.

More important, however, is the fact that "nonwithdrawable" is "reasonably susceptible of interpretation" in either direction. Since, as Western argues, the three stated purposes represent the limits of its legal ability to sell power, one reasonably would expect the MOU to accomodate this reality. Nothing in the language of the MOU requires that "nonwithdrawability" be free of any and all exceptions. On the other hand, nothing in the language of the MOU requires that the three stated purposes be included. Under Appellees' interpretation, Western agreed to provide power to the parties to the MOU that would not be withdrawable for any purpose. If withdrawals become necessary in order to fulfill Western's statutory or contractual obligations, Appellees insist that they come from other customers to which Western had made no commitment for absolutely nonwithdrawable power.

The MOU is not rendered internally inconsistent by either interpretation of "nonwithdrawable." It is an am-

biguous contract as defined by *Brobeck*: one that is "reasonably susceptible" of conflicting readings.

B. What does "nonwithdrawable" mean?

[2] We have a starting point in the reported opinions *Kleppe* and *Andrus*, which set the stage for the MOU negotiations. The parties agree that in those opinion, thew word "nonwithdrawable" was used by the court to distinguish between the types of contracts Santa Clara and Cities had in the late-1960's. Joint Pretrial Statement, CR 463 at 14. In the MOU, "nonwithdrawable" appears to serve the same function: a means of distinguishing the Santa Clara-type contract from a Cities-type contract. (For example, "nonwithdrawable" is often used as an adjective to describe certain customers, as in the phrase "present nonwithdrawable customers.") In short, the MOU appears to be an agreement by Western to sell power to Santa Clara on the same terms it had previously sold power to Cities. The determinative question, therefore, appears to be what Cities' pre-MOU contracts provided.

Contracts for sale of CVP power to Cities executed in 1963 contained explicit clauses authorizing withdrawals and reductions. *See, e.g. Contract for Electric Service to City of Palo Alto, California*, No. 14-06-200-676A, December 4, 1963.[3] Article 9(b) established a mechanism for the withdrawal of power for project use and first preference customers.

> In Order to supply electric energy to preference customers in Trinity County, California, in accordance with the requirements of Reclamation law, [Western] . . . may withdraw electric power and energy, provided for hereunder, in an amount up to 25 per centum of the contract rate of delivery. The United States may at the sole discretion of [Western] reduce the

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[3] The parties stipulated that the Palo Alto contract was typical of the 1963 contracts. Joint Pretrial Statement, CR 463 at Tab C.

> contract rate of delivery for firm power hereunder by any amount necessary to supply the Project use requirements. . . .

Article 9(c) provided for load level protection:

> At times the electric energy requirements under this and similar contracts of the United States with other preference customers for the supply of firm power will be in excess of the energy available for firm load from the Central Valley Project power plants. . . . Any thing to the contrary in this contract notwithstanding, the United States shall not be obligated to furnish energy hereunder in amounts which, together with amounts to be furnished under said other preference customer contracts, are in excess of the limitations stipulated in said Contract [for firming energy with PG & E].

When Contract 2948A expanded PGB& E's commitment to provide firming energy from 550 MW to 1050 MW, Cities' contracts were amended to allow Cities the benefit of the expanded capacity. *Amendment to contract for Electric Service to City of Palo Alto,* August 22, 1967. The relevant portions of Article 9 were replaced with the following:

> [Palo Alto's allotment shall be increased] until the total firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts. In the event, however, that the power or energy available to serve the total firm load of all preference agencies contracting for power and energy is not sufficient, . . . if necessary said contract rate of delivery shall be curtailed so as not to exceed a prorata share of the total power and energy that is available. The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is not required for

> project operation or for sale under [the first preference statutes].

This language is not ambiguous. It is a straightforward recital of the three stated purposes. The first quoted sentence provides for load level protection of 1050 MW, and the third quoted sentence assures that project use and first preference customers receive their statutory priority.[4] The district court erred in finding, "the language of the 1967 amendments reasonably subject to both interpretations." Findings at 8. There is no relevant extrinsic evidence in the record that could alter the meaning of the 1967 amendments.

The question remains whether the parties agreed in the course of negotiating the MOU to alter the contents of a typical sales contract. We agree with the district court "that the evidence about the conduct of the parties during the negotiations of the MOU is inconclusive." Findings at 11. The district court's only credibility determination[5] was to reject testimony that representatives of Cities had twice requested "absolutely nonwithdrawable" power and were twice rebuffed by Western. After elimination of this testimony, the only evidence that remains is testimony from Western's witnesses who assumed that "nonwithdrawability" included three exceptions, and from Cities' witness

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[4] Appellees argue that "curtailment" to the level of "power available" as used in the 1967 amendments mean something different from "withdrawal" as used in the 1963 contracts and the MOU. We disagree. Both "withdrawal" and "curtailment" have the same practical effect: the three stated purposes must be satisfied before sales to preference customers begin. In the event that the three stated purposes require so much power as to make it impossible to supply the full Contract Rate of Delivery, all customers will face pro rata reductions.

[5] Appellees' brief reveals a penchant for labelling as "not credible" any potentially damaging testimony from Western's witnesses. *See e.g.*, Red Brief at 20, 28, 40-41. It should go without saying that the only relevant credibility determinations are those made by the district court, not the parties.

who assumed it did not. The mass of documents made a part of the record are similarly uninformative. In none of the correspondence from Western or Cities did either side explicitly or implicitly accept the other's position. The documents merely reiterate each side's understanding of the contract. Most of the time, the three stated purposes were simply not discussed. Because none of the extrinsic evidence relating to the MOU indicates an agreement by the parties to have post-MOU contracts differ from pre-MOU contracts with regard to the three stated purposes, we conclude that the MOU intended continuity with pre-MOU practice.

As did the district court, we reject Cities' contention that Appellants' interpretation denies them all their anticipated benefits from the MOU. Foremost among the benefits received under the MOU is each City's ability to grow into its full allotment at its own pace, without the wasteful race to compete for load growth that characterized the previous arrangement. Findings at 15-16. Under *Andrus*, Western had complete discretion to sell all of its power to other preference customers, leaving Appellees without any CVP power. The MOU spared the Appellees this unfavorable outcome by granting rights to purchase guaranteed amounts of CVP power, subject only to the same withdrawals for the three stated purposes that characterized all of Western's typical pre-MOU sales contracts.

CONCLUSION

The term "nonwithdrawable" as used in the MOU is ambiguous. The most reasonable interpretation is one that requires contracts for sales of power after the MOU that are consistent with those held by Cities prior to the MOU. This was the meaning of "nonwithdrawable" in the *Kleppe* and *Andrus* opinions which spawned the settlement discussions and the MOU. Because all of the pre-MOU contracts contained withdrawal provisions for the three stated purposes, the MOU must have contemplated that post-

MOU sales contracts would also contain these provisions, which were necessary to maintain Western's statutory and contractual obligations.

While we reverse on the merits, we whole-heartedly agree with the district court when it said, "In the final analysis, this action serves as yet another example of how lack of foresight and poor drafting will beget prolonged and expensive litigation. . . . It is unfortunate that the parties' neglect resulted in a judge having to determine what the parties intended ten years after the fact." Findings at 17. We now have twelve years and four judges' investment of judicial resources.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-15168
DC #CV-75-0157-SC

CITY OF SANTA CLARA, et al.
Plaintiffs-Appellees

v.

JAMES D. WATKINS, Secretary of Energy; et al.,
Defendants-Appellants,

F I L E D

JUN 23 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

ORDER

Before: FLETCHER, POOLE, and BRUNETTI, Circuit Judges

The motion for leave to file reply to appellants and appellants-intervenors response to petition for rehearing and suggestion for rehearing en banc is denied.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 75-1574 SC

CITY OF SANTA CLARA,

Plaintiff,

v.

JAMES D. WATKINS, et al.,

Defendants,

CITIES OF PALO ALTO, et al.,

Intervenor-Plaintiffs.

ARVIN-EDISON WATER STORAGE DISTRICT,

Intervenor-Defendants.

F I L E D

AUG 20, 1990

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

At issue in this action is the meaning of the word "nonwithdrawable"[1] as used in a settlement agreement between the parties. This action was filed in July 1975 in this court by the City of Santa Clara ("Santa Clara")

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[1] The words "nonwithdrawable," "on a nonwithdrawable basis," "nonwithdrawable," and "nonwithdrawability" will be used throughout this Order and are intended, as the parties stipulated, to have the same meaning.

challenging the lawfulness of the withdrawal of its allocation of power and energy from the Central Valley Project ("CVP") and the refusal of the Secretary of the United States Department of the Interior ("Secretary") to grant Santa Clara an allocation of power and energy similar to the power and energy allocations of the Cities of Palo Alto, Roseville, Redding, Biggs, and Gridley, Plumas Sierra Electrical Cooperative ("Cities"). Since 1967 Cities have been known as the "load growth Cities." This court entered an order granting in part and denying in part the parties' cross-motions for summary judgment and remanded the case to the Secretary for further administrative proceedings.

On cross-appeals of this court's order by the parties, the United States Court of Appeals for the Ninth Circuit upheld the Secretary's refusal to grant Santa Clara the allocation it sought, but ruled that the Secretary's sale of surplus preference power to Pacific Gas and Electric Company ("PG&E"), a nonpreference utility, in lieu of the sale of that power to a preference entity, ready, able, and willing to use the power, was unlawful unless the sale to the nonpreference utility was necessary to maximize the efficiency of the CVP for irrigation purposes. *City of Santa Clara v. Andrus*, 572 F.2d 660 (1978). The Ninth Circuit remanded the case to this court for the determination of whether Santa Clara was ready, able, and willing to use the surplus power not necessary to maximize the efficiency of the CVP for irrigation purposes.

During the period when the appeal was before the Ninth Circuit, in 1977, the marketing of CVP power and energy through the Department of the Interior's Bureau of Reclamation ("Bureau") was transferred to a new Department of Energy which established the Western Area Administration ("Western") as the regional marketing agency for CVP power.

On remand of the case to this court, Western, Santa Clara, PG&E, and Cities, which had been granted intervention by this Court, undertook settlement negotiations. The settlement negotiations were successfully concluded with the execution of a Memorandum of Understanding ("MOU"), approved by this Court's order of October 3, 1980. In that Order, this court reserved its jurisdiction to enforce compliance with the terms and conditions of the MOU.

Under the terms of the MOU, Santa Clara secured a contract right to purchase "on a nonwithdrawable basis" 65 MW of CVP power for the period January 1, 1980 to December 31, 2004, together with the right to purchase 60 MW of CVP power on a "withdrawable" basis and to continue to receive its existing withdrawable allotment of power. Additionally, Santa Clara received $10 million of the $85 million it had paid into an escrow fund during the litigation. Each Cities received power allocations which, together with their Contract Rates of Delivery ("CRD") under their contracts with Western, were described in the MOU as "nonwithdrawable." Cities also received reimbursement from Santa Clara in the amount of $250,000 of Cities' legal and consultant expenses incurred in the litigation. Western secured agreement from PG&E to increase its support obligation under its contract No. 2948A with Western by 102 MW, from 1050 MW to 1152 MW.

The MOU required implementation of its terms by amendments to existing contracts of Cities and Santa Clara or by new, superseding contracts which Western committed to make available promptly but not prior to execution of the MOU. Western eventually tendered a draft of a new power contract to Cities purporting to implement the terms of the MOU. The tendered drafts contained provisions providing for the withdrawal of Cities' allocations for project use requirements of the CVP, the first preference of customers in Trinity, Calaveras, and Tuolumne Counties, and to hold deliveries of CVP customer power demand

to the support level of 1050 MW PG&E had agreed to under Contract 2948A and 1152 MW under the MOU ("the three stated purposes").

Palo Alto and Roseville objected to the withdrawal provisions, advising that Cities' power allocations were not withdrawable for any reason. Without waiving their objections, Palo Alto and Roseville signed the new contracts that contained the objectionable withdrawable provisions upon inclusion in their contracts a provision giving them the right to apply to this court for enforcement of the MOU under their interpretation. Plumas Sierra refused to sign the contracts and Redding signed the contracts. Santa Clara objected to the withdrawal provisions but signed the contract after Western agreed to exempt 80 percent of the 65 MW from any withdrawals.

Palo Alto separately, and Roseville, Redding, and Plumas Sierra jointly, filed timely applications with this court for an order confirming their interpretation of the MOU regarding the definition of "nonwithdrawable." Western opposed the applications, claiming that "nonwithdrawable" as used in the MOU meant only that the power could not be withdrawn for use by other CVP customers but was subject to withdrawal for the three stated purposes. In an Order dated October 11, 1985, this court confirmed Cities' interpretation that their allocations are "not subject to withdrawal for any of the reasons enumerated by Western in its new allocation contracts." Order at p. 8. This court found that "under Western's version of the settlement agreement, Cities will have exchanged their prior right to grow into the power reserved under Contract 2948A for their load growth for no benefit at all" and that "Cities could not have intended this result by entering into the [MOU]." Order at pp. 6-7. This Order was amended to include Santa Clara.

On appeal, the Ninth Circuit, without reaching the merits of that Order, returned the case to this court with

instructions to admit Arvin Edison Water Storage District, a CVP customer, as an intervenor, to permit it to present its evidence on the meaning of "nonwithdrawable" as used in the MOU. The Ninth Circuit remanded the case due to Arvin Edison's representations in its *amicus* brief that had it known of the proceeding in this court, it could have intervened and presented evidence showing this court's interpretation of the MOU was in error. The Ninth Circuit also permitted that other CVP customers similarly situated be permitted to seek intervention. This court subsequently granted intervention to Arvin Edison, to seven other irrigation districts, to the cities of Alameda, Lodi, Lompac, Ukiah, and Heraldsburg, and four first preference customers located in the first preference counties of Trinity, Calaveras, and Tuolumne Counties to support Western's position (the "Intervenors"). Shasta Dam Area Public Utility District, one of the load growth customers in addition to Cities, intervened in support of Cities' interpretation of the MOU. An evidentiary hearing was held commencing on July 19, 1990 and concluding on July 25.

II. Findings of Fact and Conclusions of Law

1. The Intervenors presented four days of evidence to support their argument that the parties to the MOU intended that the "nonwithdrawable" power allocations were to be subject to withdrawal for the three stated purposes. Much of the evidence was intended to demonstrate that Cities' power allocation before the MOU, under 1967 contracts ("the 1967 amendments"), was subject to withdrawal for the three stated purposes and that the parties did not intend to change the nature of these power allocations in the MOU. The extrinsic evidence offered by the Intervenors is relevant and material to explaining the circumstances surrounding negotiations and execution of the MOU and the content in which the language in question was used.

2. The court finds the evidence regarding the nature of the 1967 amendments with respect to withdrawals to be inconclusive. The parties do not dispute that prior to the 1967 amendments the power allocation to Cities was subject to withdrawal for the three stated purposes. The 1967 amendments deleted from the prior contract the "whereas clauses" referring to the possibility of withdrawals for project use and the first preference of Trinity County and also deleted the provisions expressly authorizing such withdrawals. In place of the provision expressly authorizing these withdrawals, the 1967 amendments provided:

> In the event, however, that the power and energy available to serve the total firm load of all preference agencies contracting for power and energy is not sufficient, . . . if necessary said contract rate of delivery shall be curtailed so as not to exceed the pro rata share of the total power and energy that is available. The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is *not required for project operation or for sale* [*to the first preference customers*].

(emphasis added).

The intervenors presented testimony that the 1967 amendments were intended to allow withdrawals for the three stated purposes. Cities contend that this provision merely defined the power which would be used to satisfy the absolutely nonwithdrawable power allocations and that it did not provide the Bureau with the authority to make withdrawals for the three stated purposes. Cities argue that if the parties had intended the Bureau to have such authorization the earlier contracts would not have deleted the "whereas clauses" and the express language providing for withdrawals. They presented testimony that the 1967 amendments did not provide for withdrawal for any reason.

The court finds the language of the 1967 amendments reasonably subject to both interpretations. The second sentence defining the "power available" can be read to support the Intervenors' position; that is, it could be interpreted to define "power available" as a fluid amount which would be diminished if power were needed for project use or for the first preference customer. Under this reading, if the "power available" were diminished so that Cities' CRD's could not be satisfied, then the first sentence authorized the Bureau to "curtail" the Cities power allocations. On the other hand, as Cities argue, the sentence can be read to be a guarantee that the "power available" would not be reduced for project use or for the first preference customers. Under this reading, the curtailment mentioned in the preceding sentence would only occur if for reasons other than project use or first preference customer use the "power available" had to be reduced. Indeed, a witness testified that he believed the curtailment provision was intended to apply to unforeseeable natural occurrences, such as drought, which would reduce the "power available" to the Cities. The court notes, however, that the 90 days notice period in the 1967 amendments undermines this interpretation to some extent; it would not be possible for Western to give warning of a withdrawal 90 days in advance of a sudden natural disaster.

The Intervenor's extrinsic evidence regarding the 1967 amendments is also inconclusive. A March 22, 1967 letter sent to Cities 5 months before they signed the 1967 amendments advised that the amendments would contain "withdrawal provisions" for the needs of the first preference customers. While this letter has some probity regarding the parties' intent, it reflects the Bureau's position 5 months before the contract was signed and does not preclude a finding that the parties negotiated a different agreement regarding the withdrawal of power at the time the 1967 amendments were signed. The letters sent to Cities after the 1967 amendments were signed only reflect

the Bureau's interpretation of the 1967 amendments. The contracts between Cities and PG&E which noted that the 1967 amendments provided for possible withdrawals of the power available are not inconsistent with the Cities' interpretation of the 1967 amendments because the "curtailments" could be for reasons other than project use and first preference customers.

3. Despite the fact that both parties rely on their respective interpretations of the 1967 amendments in arguing their interpretations of the MOU, the court does not believe it must decide conclusively the controversy regarding the 1967 amendments. The evidence before the court establishes that the parties did not have a clear and definite understanding of the nature of the power allocations under the 1967 amendments. The fact the court finds determinative is that before the MOU and, as the court will soon discuss, during the negotiations of the MOU, there was no established meaning of the word "nonwithdrawable" different from the ordinary meaning one would impart to that word, i.e., not withdrawable for *any* reason.

If, as the Intervenors argue, the word "nonwithdrawable" was intended to mean not subject to withdrawal for other CVP customers but subject to withdrawal for the three stated purposes, the court believes that the MOU would have included a definition clearly expressing this meaning because the evidence presented to the court does not establish that the word had acquired this special meaning through custom and usage. The record shows that no CVP customer contract before the MOU used the word "nonwithdrawable" to describe a power allocation. While the record does demonstrate that the word "withdrawable" was used to describe power allocations that could be reduced to satisfy the needs of other CVP customers, it does not follow logically that the word "nonwithdrawable" means that the power allocations cannot be reduced to satisfy the needs of other CVP customers but are subject to withdrawal for the three stated reasons because, pre-

sumably, the "withdrawable" allocations were also subject to withdrawal for the three stated reasons.

4. The court finds that the evidence about the conduct of the parties during the negotiations of the MOU is inconclusive. Mr. Aghjayan, the lead negotiator for the Cities in the MOU negotiations, testified that Cities wanted a firm power commitment from Western and that they would not have entered into the MOU had the power allotments been subject to withdrawal for the three stated purposes. As in the 1985 Order, this court finds the testimony of Western's representatives that during the MOU negotiations they twice rejected Cities' request for absolutely nonwithdrawable power allocations unpersuasive in light of the other evidence. The witnesses do not recall who made the first request and are unable to recall the words in which the request was couched. With respect to the second request, allegedly made by Mr. Aghjayan in a side conversation, Mr. Aghjayan denies making such a request and the witness did not clearly recall the event. No witness testified that this issue was raised during the normal course of the negotiations.

5. The court also finds that the MOU is not rendered internally inconsistent if "nonwithdrawal" is read to mean its ordinary meaning. Paragraph 7's reference to "present nonwithdrawable customers" is clearly defined in the contemporaneously signed Mutual Release between the parties to comprise Cities and Shasta PUD. The Intervenor's reading of paragraph 7 would render the MOU and the Mutual Release inconsistent. The fact that the combined power requirements of Cities and Shasta PUD were far under 1,050 MW—the maximum load level under Contract 2948A—in 1980 does not mean that "present nonwithdrawable customers" included customers whose allocations were subject to withdrawal for the three stated purposes; the Intervenors' argument ignores that the MOU is effective until 2004 and that Cities and Shasta PUD will require more power as they grow.

6. The court finds that Western's own publications belie its interpretation of the MOU. Western's Administrator's Newsletter distributed in July of 1980, after the MOU was signed, described the power allocation as "a specific amount of CVP power that each intervenor city . . . can count on to meet future load growths." This arrangement was described as a "landmark occasion" affecting "all aspects of how the CVP allocates and markets its power." Thus, Western itself suggested that the MOU provided a determinate amount of power to each city and viewed the MOU as a significant break with past practices. The court is cognizant that the likelihood of withdrawals for the three stated purposes was considered scant and that it may not have been—in terms of probability—and exaggeration for Western to describe Cities' power allocations as amounts they could "count on," but Western's use of such unequivocal language undermines Western's position.

7. The court finds that another factor weighing against Western is that in the past Western's contracts with its CVP customers contained explicit withdrawal provisions for the three stated purposes. With the exception of the ambiguous 1967 amendments, all other CVP customer contracts contained clear and unequivocal language providing for such withdrawals. Thus, as the court found in the 1985 Order, " 'Western well knew how to make explicit exceptions to nonwithdrawability' " when they were desired. It seems odd that Western would not as a matter of course included explicit language providing for withdrawals in the MOU if this were the intended result.

8. The court finds that it would not have been nonsensical for Western to have agreed to supply Cities with nonwithdrawable power not subject to withdrawal for the three stated purposes because it is under statutory obligations to provided power for CVP project use and to the first preference customers. The SMUD contracts, extended to 2004 in 1983, allot SMUD 290 MW on an absolutely nonwithdrawable basis. This establishes that Western did

not have an inflexible policy with respect to withdrawal for the three stated purposes and that it was willing to enter into contracts which would adversely affect other CVP customers. Moreover, Federal law providing for the first preference for counties of origin does not require that Cities' allocations of CVP power be subject to withdrawal for such purposes.

9. The court disagrees with the Intervenors' argument that because the Cities' interpretation of "nonwithdrawable" would shift the burden of future withdrawals for the three stated purposes entirely to CVP customers not parties to the MOU, the rule that settlement agreements can only affect the right of the parties thereto or those in privity with them would be violated. Cities' reading of the MOU would not violate contract law because other CVP customers with contracts providing for withdrawal for the three stated purposes have no "right" to not have power withdrawn for those reasons, even if the amount withdrawn is greater because of the MOU. While Western may have made representations to the other CVP customers regarding the likelihood of withdrawals for the three stated purposes and the MOU may render those representations untrue, the other CVP customers would still maintain all their contractual and proprietary rights.

10. The Court finds the evidence regarding the benefits received by the parties to the MOU to be inconclusive. Cities claim that they will have received no benefit if Western's interpretation prevails. Although the court's 1985 Order agreed with Cities' contention, after considering the evidence presented at the evidentiary hearing the court finds that under any interpretation Cities would receive a substantial benefit from the MOU. First, while it is unclear whether Western had an obligation to furnish load-growth power after 1980, at the very least there was an uncertainty which the MOU resolved, eliminating the possibility of costly litigation over this issue and an adverse ruling. Second, Cities received $250,000 as reimbursement for

their legal expenses. Third, even if the MOU power allotments were subject to withdrawal for the three stated purposes, Cities received a "fixed"[2] allocation of power and did not have to compete with each other for the load-growth power as was the case under the previous arrangement. Although Cities' benefit would be greater if the power allotments were not subject to withdrawal for the three stated purposes, they still would have received some benefit under Western's interpretation. Accordingly, the court does not view the issue of benefits received from the MOU as a determinative issue.[3]

11. Although the court finds the meaning of the word "nonwithdrawable" to be clear and unequivocal, even if it were considered "ambiguous" the result would be the same. Western drafted the MOU and it is established contract law that if a term in a contract is ambiguous, the contract should be interpreted most strongly against the party that caused the ambiguity to exist. If Western desired "nonwithdrawable" to mean something other than its ordinary meaning it should have provided that definition in the MOU.

12. In the final analysis, this action serves as yet another example of how lack of foresight and poor drafting will beget prolonged and expensive litigation. Obviously, this is a case where the parties neglected to discuss precisely with one another what they wanted. Moreover, it is hard for the court to believe that Western's drafter did not define "nonwithdrawable" if Western intended the word to mean something other than its regularly understood meaning. It is unfortunate that the parties' neglect

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[2] The power allotments could fairly be characterized as "fixed" if the likelihood of withdrawals for the three stated purposes was very slight and the power could not be withdrawn for any other reason.

[3] Additionally, to the extent that Western's banking arrangement with PG&E was in jeopardy and that this would have an adverse effect on Cities, the MOU eliminated this concern.

resulted in a judge having to determine what the parties intended 10 years after the fact.

III. Conclusion

In accordance with the foregoing, the court finds that the word "nonwithdrawal" in the 1980 MOU means not subject to withdrawal for any reason, including the three stated purposes.

IT IS SO ORDERED.

Dated: Aug. 20, 1990

/s/ Samuel Conti
United States District Judge

APPENDIX D

August 12, 1955 1235

TRINITY RIVER DIVISION, CENTRAL VALLEY PROJECT

[Extracts from] An act to authorize the Secretary of the Interior to construct, operate, and maintain the Trinity River division, Central Valley project, California, under Federal reclamation laws. (Act of August 12, 1955, ch. 872, 69 Stat. 719)

[Sec. 1. Central Valley project. California—Trinity River division authorized.]—For the principal purpose of increasing the supply of water available for irrigation and other beneficial uses in the Central Valley of California, the Secretary of the Interior, acting pursuant to the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), is authorized to construct, operate, and maintain, as an addition to and an integral part of the Central Valley project, California, the Trinity River division consisting of a major storage reservoir on the Trinity River with a capacity of two million five hundred thousand acre-feet, a conveyance system consisting of tunnels, dams, and appurtenant works to transport Trinity River water to the Sacramento River and provide, by means of storage as necessary, such control and conservation of Clear Creek flows as the Secretary determines proper to carry out the purposes of this Act, hydroelectric powerplants with a total generating capacity of approximately two hundred thirty-three thousand kilowatts, and such electric transmission facilities as may be required to deliver the output of said powerplants to other facilities of the Central Valley project and to furnish energy in Trinity County: *Provided*, That the Secretary is authorized and directed to continue to a conclusion the engineering studies and negotiations with any non-Federal agency with respect to proposals to purchase falling water

and, not later than eighteen months from the date of enactment of this Act, report the results of such negotiations, including the terms of a proposed agreement, if any, that may be reached, together with his recommendations thereon, which agreement, if any, shall not become effective until approved by Congress. The works authorized to be constructed shall also include a conduit or canal extending from the most practicable point on the Sacramento River near Redding in an easterly direction to intersect with Cow Creek, with such pumping plants, regulatory reservoirs, and other appurtenant works as may be necessary to bring about maximum beneficial use of project water supplies in the area. (69 Stat. 719)

* * *

Sec. 4 [Sale and delivery of additional power available through construction of the division—Preference customers.]—Contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws: *Provided*, That a first preference, to the extent of 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Trinity County, California, for use in that county, who are ready, able and willing, within twelve months after notice of availability by the Secretary, to enter into contracts for the energy: *Provided further*, That Trinity County preference customers may exercise their option on the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less that eighteen months prior to said date. (69 Stat. 720)

APPENDIX E

October 23, 1962 1701

FLOOD CONTROL ACT OF 1962

[Extracts from] An act authorizing the construction, repair, and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes. (Act of October 23, 1962, Public Law 87-874, 76 Stat. 1173)

* * * * *

TITLE II—FLOOD CONTROL

* * * * *

Sec. 203. [Authorization of projects.]—

* * * * *

SAN JOAQUIN RIVER BASIN

[New Melones.]—The New Melones project, Stanislaus River, California, authorized by the Flood Control Act approved December 22, 1944 (58 Stat. 887), here hereby modified substantially in accordance with the recommendations of the Chief of Engineers in House Document Numbered 453, Eighty-seventh Congress, at an estimated cost of $113,717,000: *Provided*, That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army: *Provided further*, That the Stanislaus River Channel, from Goodwin Dam to the San Joaquin River, shall be maintained by the Secretary of the Army to a capacity of at

least eight thousand cubic feet per second subject to the condition that responsible local interests agree to maintain private levees and to prevent encroachment on the existing channel and floodway between the levees: *Provided further*, That before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined: *Provided further*, That the Secretary of the Army adopt appropriate measures to insure the preservation and propagation of fish and wildlife in the New Melones project and shall allocate to the preservation and propagation of fish and wildlife, as provided in the Act of August 14, 1946 (60 Stat. 1080), an appropriate share of the cost of constructing the Stanislaus River diversion and of operating and maintaining the same: *Provided further*, That the Secretary of the Army, in connection with the New Melones project, construct basic public recreation facilities, acquire land necessary for that purpose, the cost of constructing such facilities and acquiring such lands to be nonreimbursable and nonreturnable: *Provided further*, That contracts for the same and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws except that a first preference, to the extent as needed and as fixed by the Secretary of the Interior, but not to exceed 25 per centum of such additional energy, shall be given, under reclamation law, to preference customers in Tuolumne and Calaveras Counties, California, for use in that county, who are ready, able, and willing, within twelve months after notice of availability by the Secretary of the Interior, to enter into contracts for the energy and that

Tuolumne and Calaveras County preference customers may exercise their option in the same date in each successive fifth year providing written notice of their intention to use the energy is given to the Secretary not less than eighteen months prior to said dates: *And provided further,* That the Secretary of the Army give consideration during the preconstruction planning for the New Melones project so the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control. (76 Stat. 1191)

* * * * *

APPENDIX F

PROVISION IN THE CITY OF PALO ALTO CONTRACT, AS AMENDED IN 1967, RELATING TO BILLING ADJUSTMENTS FOR CURTAILMENT OF DELIVERIES OF POWER.

"K. Adjustments for Curtailments to Service.

Billing adjustments will be made if the delivery of electric energy is curtailed because of conditions on the power system of the United States, which system for the purpose of such adjustments hereunder shall include transmission facilities utilized but not owned by the United States, for periods of one (1) hour or longer in duration each. The total number of hours of curtailed service in any billing period shall be determined by adding (1) the sum of the number of hours of interrupted service to (2) the product of: the number of hours or reduced service multiplied by the percentage of said reduction below the lesser of (a) the contract rate of delivery, or (b) the obligation of the United States to deliver firm power and energy as established under the operating agreement entered into pursuant to the Auxiliary Power Service article hereof, or (c) the rate of delivery required by the Contractor at the time of such reduction. The demand or capacity charge, the kilowatt hour blocks of the energy charge, and the minimum charge shall each be proportionately adjusted in the ratio that the total number of hours of such curtailed service as herein determined bears to the total number of hours in the billing period involved. The Contractor shall make written claim, within thirty (30) days after receiving the monthly bill, for adjustment on account of any curtailment to service, for periods of one (1) hour or longer in duration each, alleged to have occurred and which is not reflected in such bill. Failure to make such written claims, within said thirty (30) day period, shall constitute a waiver thereof. All curtailments to service, which are due to conditions on the power system of the United States,

shall be subject to the provisions of this article and the Contractor shall be limited in its remedy to the relief granted by this article; *Provided*, That withdrawal of power and energy under the contract provisions shall not be deemed curtailments to service."

APPENDIX G

LIST OF 20 CONTRACTS WITH THE LANGUAGE INTERPRETED BY THE COURT IN THE CITY OF PALO ALTO CONTRACT AS AUTHORIZING WITHDRAWALS OF POWER FOR PROJECT USE AND THE FIRST PREFERENCE OF THE THREE COUNTIES THAT INCLUDE EXPLICIT PROVISIONS FOR WITHDRAWALS FOR PROJECT USE AND THE FIRST PREFERENCE OF ONLY TRINITY COUNTY.

The 20 CVP contracts, included in Plaintiffs Exhibit No. 26, Volumes I and II, which include the same language interpreted by the Court as a straight forward authorization subjecting Cities' allocation to withdrawal for the three stated purposes, include explicit authorizations for withdrawal only for project use and the first preference of only Trinity County:

Volume I of P. Ex. No. 26

1. United States Department of the Air Force - Article 11(b), pp. 6-7.
2. United States Department of the Army - Article 8(b) pp. 4-5.

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3. Atomic Energy Commission, Lawrence Livermore Laboratory - Article 11(b), pp. 5-6.
4. Atomic Energy Commission, Stanford Linear Accelerator Center - Article 11(b), pp. 5- 6
5. U.S. Department of the Navy-Article 19(b), p. 6.
6. National Aeronautics and Space Administration - Article 9(b), p. 3
7. Deuel Vocational Institution, Dept. of Correction - Article 7(b), pp. 3-4.
8. Folsom State Prison, Dept. of Correction - Article 8(b), pp. 3-4.
9. Department of Youth Authority, California - Article 7(b), pp. 3-4.

10. University of California at Davis - Article 7(b), p. 4.
11. California Medical Facility, Dept. of Correction - Article 7(b), pp. 3-4.
12. Banta Carbona Irrigation District - Article 7(b), pp. 3-4.
13. Byron - Bethany Irrigation District - Article 7(b), pp. 3-4.
14. East Contra Costa Irrigation District - Article 7(b), pp. 3-4.
15. Glenn-Colusa Irrigation District - Article 7(b), pp. 3-4 (only project use).
16. Patterson Water District - Article 7(b), p. 4
17. Provident Irrigation District - Article 7(b), pp. 3-4.
18. San Luis Water District - Article 7(b), p. 4.
19. West Side Irrigation District - Article 7(b), pp. 3-4.
20. West Stanislaus Irrigation District - Article 7(b), p. 4.

APPENDIX H(1)

EXCERPTS FROM CONTRACT FOR ELECTRIC SERVICE TO CITY OF PALO ALTO, CALIFORNIA

1. This contract made this 4th day of December 1963 in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. 388), the Act of Congress approved August 26, 1937 (50 Stat. 844, 850), the Act of Congress approved August 4, 1939 (53 Stat. 1187), the Act of Congress approved August 12, 1955 (69 Stat. 719), and acts amendatory thereof or supplementary thereto, all of which acts are hereinafter called Reclamation Law, between THE UNITED STATES OF AMERICA, hereinafter called the United States, represented by the officer executing this contract, his duly appointed successor, or his duly authorized representative, hereinafter called the Contracting Officer, and the CITY OF PALO ALTO, CALIFORNIA, a municipal corporation hereinafter called the Contractor represented by the officer executing this contract, his duly appointed successor, or his duly authorized representative,

2. WHEREAS, the United States operates an electric power system including generation and transmission facilities as a part of the Central Valley Project and the Contractor operates an electric power distribution system serving the City of Palo Alto, California hereinafter referred to as Contractor's System; and

3. WHEREAS, the United States, by virtue of adding the Trinity River Division powerplants to the Central Valley Project, will have additional power and energy available for sale; and

4. WHEREAS, under Reclamation law which authorized construction of the Trinity River Division, first preference to the extent of 25 per centum of such additional energy must be given, under certain conditions, to preference customers in Trinity County, California; and

5. WHEREAS; withdrawal of power will be necessary to meet project use requirements of the Central Valley Project including those of the Federal San Luis Unit; and

6. WHEREAS, the United States is able to make electric service available to the Contractor and the Contractor desires to obtain such electric service from the United States; and

7. WHEREAS, service hereunder is to be furnished under the terms of certain contracts between the United States and Pacific Gas and Electric Company for the sale and interchange of electric power and energy, Contract No. I75r-3428, and for transmission and exchange service, Contract No. I75r-2650, which expire on April 1, 1971, but are subject to prior cancellation under certain circumstances upon three (3) years advance notice in writing;

8. NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the parties hereto agree as follows:

ELECTRIC SERVICE TO BE FURNISHED

9. (a) The United States, under the terms and conditions stipulated herein, will furnish electric service to the Contractor, from and after the date of initial service as hereinafter defined, at the point at which the 60,000 volt circuits of the Contractor are attached to the 60,000 volt circuits of the Pacific Gas and Electric Company at or near the City of Palo Alto, California. Said electric service will be furnished over facilities of the Pacific Gas and Electric Company under the terms and conditions provided in Contract I75r-2650 between the United States and the Pacific Gas and Electric Company (copies of which are on file in the Regional Office of the United States Bureau of Reclamation at Sacramento, California) or under said contract as it may be amended, or extended, from time to time, or under the terms and conditions of any contract that may supersede or succeed said contract.

(b) Electric power and energy furnished hereunder will be delivered to the Contractor at a nominal delivery voltage of 60,000 volts and will be measured at or near Palo Alto, California at 60,000 volts. Electric energy will be delivered in amounts which the Contractor may from time to time require up to a maximum rate of delivery, hereinafter called the contract rate of delivery for firm power of seventy-nine thousand (79,000) kilowatts. In order to supply electric energy to preference customers in Trinity County, California, in accordance with the requirements of Reclamation law, the Contracting Officer, upon seventeen (17) months advance written notice to the Contractor, may withdraw electric power and energy, provided for hereunder, in an amount up to 25 per centum of the contract rate of delivery. The United States may at the sole discretion of the Contracting Officer reduce the contract rate of delivery for firm power hereunder by any amount necessary to supply the Project use requirements including operation of the Federal San Luis Unit of the Central Valley Project; *Provided*, That the United States shall have given written notice to the Contractor seventeen (17) months in advance of the effective date of such reduction in the contract rate of delivery. Upon receipt of notice of reduction in the contract rate of delivery for firm power, the Contractor may terminate this contract at any time within sixteen (16) months after receipt of such notice by notifying the Contracting Officer in writing six (6) months prior to the desired termination date.

(c) At times the electric energy requirements under this and similar contracts of the United States with other preference customers for the supply of firm power will be in excess of the energy available for firm load from the Central Valley Project powerplants. Such excess will be supplied by the United States through purchases under its Sale and Interchange Contract No. I75r-3428 with the Pacific Gas and Electric Company, or under terms and conditions of any contract that may supersede or succeed said

contract up to such months as are required to bring the total energy deliveries under said preference customer contracts in any month or year up to the respective maximum amounts of firming energy that the Pacific Gas and Electric Company is obligated to supply. The Pacific Gas and Electric Company under said Contract No. I75r-3428, which terminates on April 1, 1971, is obligated to provide energy in sufficient amounts (1) to bring the total energy available in any month up to five hundred fifty (550) kilowatthours for each kilowatt of the simultaneous maximum 30-minute integrated demand in that month under such preference customer contracts, and (2) to bring the total energy available to serve any individual customer's requirements up to six thousand five hundred (6,500) kilowatthours of its maximum 30-minute integrated demand in that year. Any thing to the contrary in this contract notwithstanding, the United States shall not be obligated to furnish energy hereunder in amounts which, together with amounts to be furnished under said other preference customer contracts, are in excess of the limitations stipulated in said Contract No. I75r-3429, or under terms and conditions of any contract that may supersede or succeed said contract.

(d) Availability of electric power and energy to the United States in an amount adequate to meet the contract rates of delivery and electric energy requirements under this and other contracts with preference customers is dependent upon arrangements made in the Sales and Interchange Contract No. I75r-3428 between the United States and the Pacific Gas and Electric Company. The United States may reduce to any amount the contract rate of delivery for firm power hereunder effective on the termination or cancellation of said contract No. I75r-3428; *Provided*, That the United States shall have given written notice to the Contractor ninety (90) days in advance of the effective date of reduction in contract rate of delivery for firm power. The Contractor may terminate this con-

tract at any time within 30 days after receipt of such notice, but not thereafter.

* * * * *

APPENDIX H(2)

EXCERPTS FROM AMENDMENT NO. 3 TO CONTRACT FOR ELECTRIC SERVICE TO CITY OF PALO ALTO, CALIFORNIA

1. This contract made this 22nd day of August 1967 in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto; all of which acts are hereinafter called Reclamation Law, between THE UNITED STATES OF AMERICA, hereinafter called the United States, represented by the officer executing this contract amendment, his duly appointed successor, or his duly authorized representative, hereinafter called the Contracting Officer, and the CITY OF PALO ALTO, CALIFORNIA, a municipal corporation, hereinafter called the Contractor, represented by the officer executing this contract, his duly appointed successor, or his duly authorized representative;

WITNESSETH:

2. WHEREAS, the United States operates an electric power system including generation and transmission facilities as a part of the Central Valley Project and the Contractor operates an electric power distribution system serving the City of Palo Alto, California, hereinafter referred to as Contractor's System; and

3. WHEREAS, the United States has been furnishing electric service to the Contractor under the provision of Contract No. 14-06-200-676A dated December 4, 1963, as amended; and

4. WHEREAS, the Contractor desires increased amounts of electric service and the United States is willing to furnish additional service under the terms and conditions stated herein; and

5. WHEREAS; the parties hereto desire to further amend Contract No. 14-06-200-676A dated December 4, 1963, as

amended, to increase the contract rate of delivery for firm power;

NOW THEREFORE, in consideration of the mutual covenants herein set forth, the parties hereto agree as follows:

6. Articles 3, 4, 6, and 7 of the preamble to Contract No. 14-060200-676A as amended are hereby deleted.

7. Article 9 of Contract No. 14-06-200-676A, as amended, is hereby deleted and in lieu thereof the following is inserted:

> "(a) The United States, from the date of initial service as hereinafter defined, shall furnish electric service to the Contractor at an agreed point near the City of Palo Alto, California. Such service shall be at a nominal delivery voltage of 60,000 volt and shall be measured at or near the point of delivery at 60,000 volts.
>
> "(b) Electric power and energy shall be delivered in such amounts as the Contractor may from time to time require up to a maximum rate of delivery, hereinafter called the contract rate of delivery for firm power, of 100,000 kilowatts. To the extent that power and energy is available, said contract rate of delivery shall be increased from time to time to serve the firm load growth of the Contractor up to the level which the Contractor's firm load reaches in 1980 or until the total firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts. In the event, however, that the power or energy available to serve to total firm load of all preference agencies contracting for power and energy is not sufficient, no further increases in the Contractor's rate of delivery shall be made and if necessary said contract rate of delivery shall be curtailed so as not to exceed a pro-rata share of the total power and energy that is available. The total power and energy available to serve

preference agency firm load shall be the power and energy generated at project generating plants that is not required for project operation or for sale either under Section 4 of the Act of August 12, 1955 (69 Stat. 719), or under that portion of Section 201, Title II of the Act of October 23, 1962, pertaining to the San Joaquin River Basin (76 Stat, 1191-1192) as supplemented by power and energy from such other sources as the United States may in its sole discretion provide. The Contractor's share shall be in the ratio of the Contractor's firm load to the firm load of all such preference agency customers as of the time of any such curtailment.

"(c) If at any time the Contractor gives written notice of desire to increase its contract rate of delivery to service its firm load growth up to the level of its 1980 firm load, and the United States does not agree to such increase in writing within ninety (90) days, the Contractor may terminate this contract at any time within thirty (30) days after expiration of such ninety (90) day period. In the event the United States must curtail an agreed-upon contract rate of delivery, or the energy associated therewith, it shall give written notice to the Contractor ninety (90) days in advance of the effective date of such curtailment, and the Contractor may terminate this contract within thirty (30) days after receipt of such notice."

* * * * *

APPENDIX H(3)

EXCERPTS FROM CONTRACT FOR ELECTRIC SERVICE TO CITY OF PALO ALTO IN PURPORTED COMPLIANCE WITH THE MEMORANDUM OF UNDERSTANDING

1. This contract made this 30th day of April 1985, in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. 388), the Act of Congress approved August 26, 1937 (50 Stat. 844, 850), the Act of Congress approved August 4, 1939 (53 Stat. 1187), the Act of Congress approved August 12, 1955 (69 Stat. 719), the Act of Congress approved October 23, 1962 (76 Stat. 1173, 1191), and the Act of Congress approved August 4, 1977 (91 Stat. 565), and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter called the United States, represented by the officer executing this contract, a duly appointed successor or a duly authorized representative, hereinafter called the Contracting Officer, and the CITY OF PALO ALTO, hereinafter called the Contractor, its successors and assigns,

WITNESSETH:

2. WHEREAS, the United States operates an electric power system including transmission facilities as a part of the Central Valley Project (CVP); and

3. WHEREAS, the Contractor operates an electric utility system hereinafter referred to as the "Contractor's System"; and

4. WHEREAS, the United States has entered into Contract No. 14-06-200-2948A dated July 31, 1967, as amended, with the Pacific Gas and Electric Company (PGandE), which, as such contract may be amended or replaced shall hereinafter be called the PGandE Contract, and said PGandE Contract provides for, among other things, a license to the United States to furnish electric

power and energy to the Contractor over the transmission system of PGandE; and

5. WHEREAS, in settlement of the lawsuit entitled *The City of Santa Clara v. Duncan et al.*, the United States has agreed to increase Contractor's contract rate of delivery in accordance with the terms of the Memorandum of Understanding dated February 8, 1980, between the parties to said lawsuit, hereinafter referred to as the Memorandum of Understanding; and

6. WHEREAS, the parties hereto desire to provide for the conditions under which firm power service will continue to be furnished and also to terminate said Contract, as amended and supplemented, and to incorporate in this new Contract such of the provisions of the terminated contract as remain appropriate; and

7. WHEREAS, under Reclamation Law which authorized construction of the Trinity River Division, and the New Melones Project, first preference to the extent of 25 per centum of the additional energy available must be given, under certain conditions, to preference customers in Trinity, Calaveras, and Tuolumne Counties, California; and

8. WHEREAS, withdrawal of power may be necessary to meet project use requirements of the CVP including those of the Federal San Luis Unit; and

9. WHEREAS, the City of Palo Alto, notwithstanding any provision to the contrary in this Contract, maintains the position that the Memorandum of Understanding excludes Palo Alto's contract rate of delivery from withdrawal as provided in subarticle (b), (c), and (e), of article 13.

NOW THEREFORE, in consideration of the mutual covenants herein set forth, the parties thereto agree as follows:

* * * * *

ELECTRIC SERVICE TO BE FURNISHED

13. (a) The Contractor is entitled to a CRD as specified in Section 2 of Exhibit A. The United States under the terms and conditions stipulated herein, will furnish, deliver, and measure Power to the Contractor's System, from and after the date of initial service as herein defined, at the point(s) and voltage(s) and under the delivery conditions specified in Exhibit C. Said Power will be furnished over the United States' facilities, facilities of its contractors or agents, or facilities of PGandE pursuant to terms and conditions provided in the PGandE Contract (copies of which are on file in the Sacramento Area Office of the Western Area Power Administration in Sacramento, California.

(b) If the United States' position should prevail as provided in subarticle (g) herein, then, in order to supply Power to preference customers in Trinity, Tuolumne, and Calaveras Counties, California, in accordance with the requirements of Reclamation Law, and pursuant to rulemaking proceedings establishing the procedures for withdrawal, the Contracting Officer may, upon ninety (90) days advance written notice to the Contractor withdraw all or part of the Contractor's CRD as specified in Exhibit A of this Contract.

(c) If the United States' position should prevail as provided in subarticle (g) herein, then, in order to supply the project use requirements of the CVP, including operation of the Federal San Luis Unit, the Contracting Officer may, upon six months advance written notice to the Contractor and pursuant to rulemaking proceedings establishing the procedures for such withdrawals, withdraw all or part of the Contractor's CRD.

(d) Upon receipt of notice of reduction in the CRD pursuant to subarticles (b), and (c) above, the Contractor may terminate this Agreement within ninety (90) days after

receipt of such notice by notifying the Contracting Officer in writing prior to the desired termination date.

* * * * *

APPENDIX I

EXCERPTS FROM MEMORANDUM OF AGREEMENT FOR ELECTRIC SERVICE TO ATOMIC ENERGY COMMISSION, SAN FRANCISCO OPERATIONS OFFICE (LAWRENCE LIVERMORE LABORATORY—SITE 300)

1. This Agreement made this 28 day of August ,1973, in pursuance of the Act of Congress approved June 17, 1902 (32 Stat. 388), the Act of Congress approved August 26, 1937 (50 Stat. 844, 850), the Act of Congress approved August 4, 1939 (53 Stat. 1187), the Act of Congress approved August 12, 1955 (69 Stat. 719, 720), and the Act of Congress approved October 23, 1962 (76 Stat. 1173, 1191), and acts amendatory thereof or supplementary thereto, all of which acts are hereinafter called Reclamation Law, and the Atomic Energy Act of 1954, as amended, between the BUREAU OF RECLAMATION, hereinafter called Reclamation, represented by the Officer executing this agreement, his duly appointed successor, or his duly authorized representative, hereinafter called the Contracting Officer, and the ATOMIC ENERGY COMMISSION, hereinafter call the AEC, represented by the Officer executing this agreement, his duly appointed successor, or his duly authorized representative,

WITNESSETH:

2. WHEREAS, Reclamation operates an electric power system including generation and transmission facilities as part of the Central Valley project; and

3. WHEREAS, AEC is a preference customer for electric service from the Central Valley Project as provided in Reclamation Law; and

4. WHEREAS, Reclamation and AEC have entered into and subsequently amended a memorandum of agreement dated June 23, 1964, No. 14-06-200-1026A, for electric service to those electric power distribution systems operated by the AEC at Lawrence Livermore Laboratory, Liver-

more; and Site-300 near Tracy; both located in California and hereinafter referred to as the AEC's power systems; and

5. WHEREAS, the AEC has designated its San Francisco Operations Office to act in behalf of the AEC in contracting with Reclamation for electric service for the above AEC installations situated within the market area of the Central Valley Project; and

6. WHEREAS, Reclamation has been able to make certain additional electric service hereinafter called short term power available to AEC on a withdrawable basis from previously allocated but currently unused firm power and energy, and AEC desires to continue receiving such additional electric service from Reclamation; and

7. WHEREAS, withdrawal of such short term power from the AEC will be necessary from time to time to maintain other preference customer loads; and

8. WHEREAS, withdrawal of power by Reclamation may be necessary to meet Project requirements of the Central Valley Project; and

9. WHEREAS, the United States and the Pacific Gas and Electric Company have entered into a contract expiring January 1, 2005, specifically the Sale, Interchange, and Transmission Contract No. 14-06-200-2498A, hereinafter called the Sales and Transmission Contract, which contract affects service hereunder;

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the Parties agree as follows:

TERMINATION OF EXISTING MEMORANDUM OF AGREEMENT

10. Memorandum of Agreement No. 14-06-200-1026A, as amended, is terminated on the date this agreement becomes effective.

ELECTRIC SERVICE TO BE FURNISHED

11. (a) Reclamation, under the terms and conditions stipulated herein, will furnish electric service to the AEC at the points at which the circuits of the AEC are attached to the circuits of the Pacific Gas and Electric Company at or near the locations listed in sub-article 11(b), said electric service will be furnished over facilities of the Pacific Gas and Electric Company under the terms and conditions in the Sales and Transmission Contract (copies of which are on file in the Regional Office of Reclamation at Sacramento California) or under said contract as it may be amended or extended, or under the terms and conditions of any contract that may supersede or succeed said contract.

(b) Electric service furnished hereunder will be delivered to the AEC at the listed points of delivery in accordance with the conditions tabulated below:

Item	AEC Installation and Location	Metering and Delivery Point	Delivery Voltage	Metering Voltage
a.	Lawrence Livermore Laboratory Livermore, Ca.	4½ miles east of Livermore near East Avenue and Greenville Road	110,000	13,800
b.	Site-300 near Tracy, Ca.	9 miles Southwest of Tracy and bounding on Corral Hollow Road	110,000	12,000

Electric energy will be delivered in amounts which the AEC may from time to time require up to a maximum rate of delivery, hereinafter called the aggregate contract rate of delivery of 30,900 kilowatts; *Provided*, That electric service furnished to each point of delivery hereunder will

be considered in two classifications, long term power and short term power respectively, the former being supplied from a prior allocation of commercial power form the Project to the AEC, the latter subject to prior allocation of commercial power to other preference agencies, and the sum being the contract rate of delivery of firm power at said points of delivery; and Provided further; That the delivery of short term power hereunder is partially or wholly withdrawable upon 30 days advance notice in writing to the AEC by the Contracting Officer. The contract rates of delivery shall be the sum of long term and short term power to the points of delivery tabulated below:

Item	AEC Installation and Location	Long Term Power	Short Term Power	Contract rate of Delivery
a.	Lawrence Livermore Laboratory, Livermore, California	20.3 MW	7.6 MW	27.9 MW
b.	Site-300, near Tracy California	2.5 MW	0.5 MW	3.0 MW
	Total	22.8 MW	8.1 MW	30.9 MW

Electric service to any point of delivery may be permanently reduced or discontinued, as mutually agreed, on receipt of notice by the Contracting Officer received not less than 30 days in advance of the date on which reduction or discontinuance at said point of delivery is desired by the AEC. The reduced contract rate of delivery at said point of delivery shall be in effect for billing purposes in the billing period next following the date on which said reduction or discontinuance is desired by the AEC. The AEC may request reallocation of the long term power in whole or in part to any other AEC installation listed herein, and/or the Stanford Linear Accelerator Center, Menlo

Park, California. The Contracting Officer shall consider said request for reallocation of long term power from facilities of the Central Valley Project and within 90 days after receipt thereof the Contracting Officer shall inform the AEC of the disposition to be made of the amount of long term power resulting from such reduction. Power and energy delivered to AEC hereunder is part of the power and energy generated at Project generating plants, as supplemented by power and energy from such other sources as Reclamation may provide, which is not required for Project operation or to supply preference customers in Trinity, Tuolumne and Calaveras Counties, California, in accordance with the requirements of Reclamation Law. The Contracting Officer, upon 17 months advance written notice to the AEC may withdraw electric power and energy provided for hereunder in an amount up to 25 percent of the 22,800 kilowatts of power and energy from Trinity River Division Powerplants to supply preference customers in Trinity County except insofar as said 22,800 kilowatts may have been diminished by virtue of the request of the AEC as hereinabove provided. Reclamation may also at the sole discretion of the Contracting Officer reduce the contract rate of delivery for power hereunder by any amount necessary to supply the Project use requirements of the Central Valley Project; Provided, That Reclamation shall have given written notice to the AEC 17 months in advance of the effective date of such reduction in the contract rate of delivery. Delivery of power and energy under this agreement is contingent upon the provisions of the Sale and Transmission Contract, modification, termination, or cancellation of which shall be deemed cause for reduction by any amount of the aggregate contract rate of delivery for power hereunder; Provided; That Reclamation shall have given written notice to the AEC 17 months in advance of the effective date of such reduction in the contract rate of delivery.

* * * * *

APPENDIX J

LISTING OF CENTRAL VALLEY PROJECT POWER CONTRACTS IN EXISTENCE DURING 1980 SETTLEMENT NEGOTIATIONS IN THE ORDER IN WHICH THEY APPEAR IN PLAINTIFFS' EXHIBIT NO. 26, VOLS. I AND II

Volume I of Plaintiffs' Ex. No. 26

CUSTOMER	CONTRACT NO.	DATE
Municipalities		
City of Biggs	14-06-200-3265A	03/08/67
City of Gridley	14-06-200-575A	08/15/63
City of Palo Alto	14-06-200-676A	12/04/63
City of Redding	14-06-200-887A	04/28/64
City of Roseville	14-06-200-586A	08/21/63
City of Santa Clara	14-06-200-2484A	09/30/65
Utility Districts		
Sacramento Municipal Utility District	14-06-200-290	12/11/52 as revised 1/26/54
Shasta Dam Area PUD	14-06-200-2369A	09/27/65
Rural Electric Cooperatives		
Plumas-Sierra	14-06-200-963A	06/08/64
U.S. Government Authorities		
Air Force	14-06-200-7045A	03/27/73
Dept. of the Army	14-06-200-7075A	12/23/74

Volume II of Plaintiffs' Ex. No. 26

CUSTOMER	CONTRACT NO.	DATE
Lawrence Livermore Site 300	14-06-200-7076A	08/28/73
Stanford Linear Accelerator Center	14-06-200-6088A	08/28/73
Dept. of the Navy	14-06-200-7058A	03/09/74
NASA-Ames	14-06-200-7545A	04/30/74
U.S. Information Agency - Dixon	14-06-200-2184A	06/15/65
State Authorities		
Duel Vocational Institution	14-06-200-7448A	09/04/73
Folsom State Prison	14-06-200-7450A	09/19/73
Youth Authority	14-06-200-7366A	09/25/73
University of CA, Davis	14-06-200-7349A	09/28/73
CA Medical Facility Near Vacaville	14-06-200-7449A	09/04/73
Water and Irrigation Districts		
Arvin-Edison Water Storage District	14-06-200-3667A	06/28/68
Banta-Carbona ID	14-06-200-7681A	04/25/74
Byron-Bethany ID	14-06-200-7775A	07/31/74
East Contra Costa ID	14-06-200-7870A	08/30/74
Glenn-Colusa ID	14-06-200-7942A	12/24/74
Patterson WD	14-06-200-8024A	04/29/75
Provident ID	14-06-200-7209A	
Reclamation District 2035	14-06-200-7210A	05/01/73

San Luis WD	14-06-200-7685A	04/26/74
West Side ID	14-06-200-7564A	01/22/74
West Stanislaus	14-06-200-7653A	04/25/74
Westlands WD	7-07-20-P0003	
Westlands WD	14-06-200-3131A	12/01/66

APPENDIX K

ESTIMATED COST OF POWER TO REPLACE WITHDRAWAL OF 25 PERCENT OF CITIES' POWER ALLOCATIONS FOR THE PERIOD FROM 1994 THROUGH 2004, THE REMAINING YEARS OF CITIES' CONTRACTS WITH WESTERN, AND OTHER DATA RESPECTING CITIES

	Population	Service Area (sq. mi.)	Number of Customers	Estimated Increased Cost of Replacement Power Over Power Withdrawn	Average Annual Increased Cost
Biggs	1,679	1[1]	621[1]	$88,809	$8,073
Gridley	4,820	1.5	2,195[2]	$6,760,977[2]	$563,414
Palo Alto	56,000	26	27,220[3]	$169,000,000[3]	$14,083,333
Plumas Sierra	14,376	2,000[4]	5,466[4]	$8,979,073	$816,552
Redding	76,000	58.6	34,896[5]	$83,000,000	$7,545,000
Roseville	53,816	29.2	24,597[6]	$35,000,000	$3,100,000

[1] Biggs actual service are less than 1 square mile. Of the 621 customers, 575 are residential, 45 are commercial, and 1 is industrial.

[2] Of Gridley's 2,195 customers, 1,682 are residential and 513 are commercial. The $6,760,977 is based on the period 1993 through 2004.

[3] Of the 27,220 customers, 24,447 are residential, 2,400 are commercial, 195 are industrial and 178 are in other categories. The $169,000,000 is based on the period 1993 through 2004.

[4] Plumas-Sierra is a Rural Electric Cooperative, serving the Counties of Plumas-Sierra, Lassen and Washoe. The 2,000 square miles comprise the service area of the three counties. Of the 5,466 customers, 4,792 are residential, 525 are commercial, 16 are industrial, and 133 are irrigation customers.

[5] Of the 34,896 customers, 28,982 are residential, 4,869 are commercial and 1,045 are in other categories.

[6] Of the 24,597 customers, 21,511 are residential and 3,086 are either commercial or industrial.

Supreme Court, U.S.
FILED
NOV 24 1993

No. 93-444

In the Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF PALO ALTO, ET. AL., PETITIONERS

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals correctly construed a 1980 memorandum of understanding that settled litigation concerning the allocation of hydroelectric power from the Central Valley Project in California.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-444

CITY OF PALO ALTO, ET. AL., PETITIONERS

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 984 F.2d 1008. The opinion of the district court (Pet. App. 18a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1993. On June 23, 1993, the court of appeals denied a petition for rehearing. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on September 20, 1993. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATEMENT

1. This case addresses the proper interpretation of one term ("nonwithdrawable") in a settlement agreement resolving prior litigation in the district court. Pet. App. 4a. The settlement agreement addresses the allocation of hydroelectric power produced by the Central Valley Project (CVP) in California. Below, petitioners (Cities) interpreted the term "nonwithdrawable" to mean "not withdrawable for any reason," while the respondents contended that it was a term of art incorporating three exceptions. *Ibid.*

Prior to the litigation that resulted in the settlement agreement, the City of Santa Clara had obtained from the United States an allocation of CVP hydroelectric power on a "withdrawable" basis. The "withdrawable" condition allowed CVP to reduce or withdraw Santa Clara's allocation to meet the needs of other CVP municipal customers. These other CVP customers, which included Cities, received CVP power on a long-term, "nonwithdrawable" basis. Pet. App. 5a.

Beginning in the 1970s, CVP began withdrawing from Santa Clara's "withdrawable" allocation. Santa Clara brought suit in 1975 against the Bureau of Reclamation, United States Department of the Interior (whose marketing functions were later transferred to the Western Area Power Administration, United States Department of Energy (Western)), arguing that pursuant to 43 U.S.C. 485h(c), it was entitled to obtain the same type of long-term, "nonwithdrawable" allocation that other CVP customers enjoyed. Pet. App. 5a-6a; *City of Santa Clara* v. *Kleppe*, 418 F. Supp. 1243, 1250 (N.D. Cal. 1976), aff'd

in part, rev'd in part *sub nom. City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir.), cert. denied, 439 U.S. 859 (1978). After concluding that the Bureau had violated Santa Clara's procedural due process rights, the district court remanded to the Bureau for further administrative proceedings. See Pet. App. 19a. The court of appeals held that while "the Secretary had unreviewable discretion to determine how allocations among preference customers were made," "the Secretary could not continue its practice of selling CVP power to * * * a non-preference customer, if a preference customer was willing and able to purchase it." *Id.* at 5a-6a (citing *Andrus*, 572 F.2d at 672, and 43 U.S.C. 485h(c)). The court of appeals remanded so that the district court could determine whether Santa Clara had rights to the power sold to non-preference customers. Pet. App. 4a-6a.

2. In 1980, all then existing parties to the litigation, including Cities,[1] settled the litigation through a Memorandum of Understanding (MOU), effective through the year 2004, and a mutual release of claims. Pet. App. 6a, 20a. The MOU set guidelines for new contracts for the sale of CVP power. *Ibid.*

Under the terms of the MOU, Santa Clara, for the first time, received a contract right for an allocation of CVP power on a "nonwithdrawable" basis.[2] The district court reserved jurisdiction to

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[1] Cities had intervened following the remand. Pet. App. 20a.

[2] Santa Clara also received rights to an additional allocation on a "withdrawable" basis. Pet. App. 6a, 20a. Cities each received an increase in their pre-MOU "nonwithdrawable" allocations. *Ibid.*

enforce compliance with the MOU's terms and conditions. Pet. App. 6a, 20a.

3. In 1985, in accordance with the MOU, Western tendered new contracts to Santa Clara and Cities for the purchase of CVP power. The contracts permitted Western to make withdrawals from those customers' allocations for three stated contractual or statutory purposes: (1) to supply the pumping loads of the CVP's water supply functions; (2) to satisfy statutory entitlements of customers situated in three of the CVP reservoirs' counties of origin; and (3) to prevent the CVP system from exceeding the maximum peak load allowed under Western's power sales and transmission contract with the Pacific Gas and Electric Company (Contract 2948A). Pet. App. 6a-7a. Palo Alto, joined later by the other petitioners and Santa Clara, applied to the district court for an interpretation of "nonwithdrawable" in the MOU, and argued that the term exempted its allocation from withdrawals for the three stated purposes. *Id.* at 21a.[3]

The district court held that the term "nonwithdrawable" was not subject to any exception. Pet. App. 21a. The Ninth Circuit, without reviewing the merits, remanded to permit the district court to entertain other CVP customers' motions to intervene and to consider the intervening entities' evidence. *Id.* at 22a. The Ninth Circuit instructed the district court to consider extrinsic evidence to establish the

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[3] To date, Western has not had to make withdrawals for any of the three stated purposes. Pet. App. 7a. Under Cities' interpretation, however, if such a withdrawal became necessary, the CVP customers that were not parties to the MOU would bear the entire withdrawal burden. *Id.* at 8a.

meaning of "nonwithdrawable" under the California rule recognized in *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866, 871-872 (9th Cir.), cert. denied, 444 U.S. 981 (1979). See Pet. App. 10a.

4. On remand, the parties agreed that the MOU preserved the kind of allocation that Cities had at the time of the settlement; they disagreed, however, on the terms of those pre-MOU allocations. The parties and the district court concentrated on Cities' pre-MOU power contracts—referred to as "the 1967 amendments." Pet. App. 23a, 25a.

Western, with the CVP customers that intervened,[4] contended that the 1967 amendments had provided for withdrawals for the three stated purposes. Cities contended that the 1967 amendments had eliminated the possibility of such withdrawals. Pet. App. 23a. The district court found that the language of the 1967 amendments was "reasonably subject to both interpretations," and that "extrinsic evidence regarding [the nature of] the 1967 amendments" with respect to withdrawals was inconclusive. *Id.* at 24a. Nevertheless, the district court held that "nonwithdrawable" clearly and unequivocally meant that

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[4] Three groups of CVP customers intervened: "First Preference Customers"—Trinity County Public Utilities District, Hayfork Valley Public Utility District, Calaveras Public Power Agency and Tuolumne County Public Power Agency; "Irrigation Districts"—Arvin-Edison Water Storage District, Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, Glen-Colusa Irrigation District, James Irrigation District, San Luis Obispo Water District, West Side Irrigation District and West Stanislaus Irrigation District; and "Five Cities"—the California Cities of Lodi, Lompoc, Ukiah and Healdsburg, and the Bureau of Electricity of the City of Alameda.

the allocations were not subject to withdrawal for any reason. *Id.* at 29a.

5. The Ninth Circuit, applying *Brobeck, Phleger & Harrison* v. *Telex Corp.*, 602 F.2d 866, 871-872, cert. denied, 444 U.S. 981 (1979), reversed in a unanimous opinion. Pet. App. 1a-15a. The court agreed that the term "nonwithdrawable" in the MOU itself was ambiguous. *Id.* at 10a; see *ibid.* (the MOU's frequent use of "nonwithdrawable" suggests that the word "also may have a specialized meaning unique to the MOU"). Consequently, the court found it necessary to go outside the document's four corners to understand the MOU's undefined terms. *Ibid.*

The Ninth Circuit used, as a "starting point," the reported opinions that "set the stage for the MOU negotiations." Pet. App. 11a; see *ibid.* ("[i]n the MOU, 'nonwithdrawable' appears to serve the same function" as in *Kleppe* and *Andrus*).[5] Taking into account the parties' agreement that those cases used "nonwithdrawable" "to distinguish between the types of contracts Santa Clara and Cities had in the late-1960's," the court reasoned:

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[5] In the cited cases (see pp. 2-3, *supra*), both the court of appeals and the district court used "nonwithdrawable" to distinguish contracts under which the customer's power allocation was not subject to withdrawal to meet the requirements of other CVP customers to whom the power had previously been committed, from contracts like Santa Clara's under which the power was withdrawable to meet the requirements of other CVP customers. The parties to this appeal have stipulated that this is precisely the way "nonwithdrawable" is used in the reported opinions. Undisputed Fact 7, Joint Pretrial Statement, C.R. 463, at 14.

> the MOU appears to be an agreement by Western to sell power to Santa Clara on the same terms it had previously sold power to Cities. The determinative question, therefore, appears to be what Cities' pre-MOU contracts provided.

Ibid; see *id.* at 10a ("Since * * * the three stated purposes represent the limits of [Western's] legal ability to sell power, one reasonably would expect the MOU to accommodate this reality.").

Addressing Cities' pre-MOU contracts, the Ninth Circuit rejected the district court's conclusion that the language of the 1967 amendments was "reasonably subject to both interpretations." Pet. App. 13a. It held that the language in Article 7 of Cities' 1967 contract amendments[6] describing Cities' allocations (their Contract Rates of Delivery (CRD)) was "a straightforward recital of the three stated purposes," and "no relevant extrinsic evidence [existed] in the record that could alter the meaning of the 1967 amendments." *Ibid.*[7]

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[6] Article 7 is the amended version of Article 9 of the pre-existing contract. See Pet. App. 46a-47a.

[7] Cities had argued that the 1967 amendments, which referred to the "curtailment" of the level of "power available," did not permit withdrawals for the three stated purposes. Pet. App. 13a n.4. The court specifically rejected that argument (*ibid.*):

> Both "withdrawal" and "curtailment" have the same practical effect: the three stated purposes must be satisfied before sales to preference customers begin. In the event that the three stated purposes require so much power as to make it impossible to supply the full Contract Rate of Delivery, all customers will face prorata reductions.

Finally, the Ninth Circuit agreed with the district court that "the evidence about the conduct of the parties during the negotiations of the MOU" was inconclusive and that Western's interpretation would not "den[y] [Cities] all their anticipated benefits from the MOU." Pet. App. 13a-14a. The Ninth Circuit noted that "none of the extrinsic evidence relating to the MOU indicates an agreement by the parties to have post-MOU contracts differ from pre-MOU contracts with regard to the three stated purposes," and it concluded that "the MOU intended continuity with pre-MOU practice." *Id.* at 14a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals.

This case is limited to unique circumstances that may never have actual consequences, even for the parties.[8] Although its procedural history is complex, the case is fundamentally simple. It presents a matter of the application of a well-established Cali-

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[8] It is entirely speculative whether the higher electricity rates that Cities foresee from the Ninth Circuit's interpretation of "nonwithdrawable" in the MOU will ever materialize. As the Ninth Circuit observed, "[t]o date, there have never been withdrawals for the three stated purposes. No one knows for certain if withdrawals ever will be necessary, or how extensive they might be." Pet. App. 7a.

The remote risk of any withdrawals puts in proper perspective Appendix K to the certorari petition. See Pet. App. 60a. That document, which projects the cost to Cities of replacement power if the maximum 25% of CVP power were withdrawn from 1994 through 2004, is not in any event part of the record.

fornia rule of contract interpretation (accepted by the parties as the governing rule of decision) to a document (the MOU) that embodies the settlement of a particular dispute in the district court. The court of appeals' resolution of that issue presents no issue of general importance warranting review by this Court.

1. Contrary to Cities' contention (Pet. 8-13), this case presents no issue regarding the necessity of appellate courts to abide by the "clearly erroneous" standard of review under Fed. R. Civ. P. 52(a). Nothing in the Ninth Circuit decision threatens the tenet that appellate courts are not to make factual determinations *de novo*. Because the district court found the extrinsic evidence "inconclusive," Pet. App. 23a, and rested its decision on a determination that the contractual language was "clear and unequivocal," *id.* at 29a, appellate review of that determination as presenting a question of law was appropriate. See *id.* at 9a (quoting *Brobeck*, 602 F.2d at 871) ("Under California law, the determination of whether a written contract is ambiguous is a question of law."). The court of appeals did not substitute its judgment for that of the district court with respect to any finding of fact. See Pet. App. 9a.[9]

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[9] The district court properly looked to other extrinsic evidence when it found that the 1967 amendments ambiguously used the term "nonwithdrawable." Pet. App. 25a; see *id.* at 9a (quoting *Brobeck*, 602 F.2d at 871) (determining whether a provision is ambiguous requires the trial court to receive preliminary "relevant extrinsic evidence that can prove a meaning to which the language of the contract is 'reasonably susceptible.' "). To the extent the court of appeals addressed those findings of fact, it affirmed the district court. Pet. App.

The court of appeals addressed three main issues. Each issue was either subject to *de novo* review or was not in dispute. First, it concluded that the MOU used the term "nonwithdrawable" ambiguously. Pet. App. 10a-11a. Second, the court of appeals relied upon the district court's conclusion that the parties agreed that the meaning of the term "nonwithdrawable" should be resolved by reference to the 1967 amendments. *Id.* at 25a ("both parties rely on their respective interpretations of the 1967 amendments in arguing their interpretations of the MOU"); see also Pet. 10 ("Cities contended their allocations of power

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13a-14a (finding inconclusive the extrinsic evidence of the conduct of the parties and Cities' contention that Western's interpretation would "den[y] them all their anticipated benefits from the MOU"). The court of appeals, however, properly reviewed de novo the application of those findings to the language of the 1967 amendments.

The district court made two findings of fact that the court of appeals did not mention in its opinion: (1) that Western's post-MOU publications "suggested that the MOU provided a determinate amount of power to each city and viewed the MOU as a significant break with past practices," and (2) that "[i]t seems odd that Western would not as a matter of course include[] explicit language providing for withdrawals in the MOU if this were the intended result." Pet. App. 27a. See also *id.* at 29a ("Western drafted the MOU * * *. If Western desired 'nonwithdrawable' to mean something other than its ordinary meaning it should have provided that definition in the MOU."). There is no indication that the court of appeals failed to weigh properly those factual conclusions. Moreover, to the extent that the district court relied on a finding that Western drafted the MOU, the court clearly erred. The undisputed facts in the record demonstrate that all the parties, including Cities, shared in the drafting of the MOU. Joint Pretrial Statement, Facts 11, 12, 13, C.R. 463, at 15.

became 'nonwithdrawable', as a result of the 1967 amendments to Cities' contracts which amendments fulfilled Western's commitment to Cities in 1964.").

Finally, the court of appeals held that the 1967 amendments unambiguously used the term "nonwithdrawable" to subject allocations for the three stated purposes. Pet. App. 13a. Because the court of appeals found the pre-MOU provisions to be unambiguous, it had no reason to look to other extrinsic evidence. *Brobeck*, 602 F.2d at 871 ("If the court finds after considering * * * preliminary [extrinsic] evidence that the language of the contract is not reasonably susceptible of interpretation and is unambiguous, extrinsic evidence *cannot* be received for the [broader] purpose of varying the terms of the contract." (emphasis added)). Following the analysis suggested by the parties, the court of appeals applied the pre-MOU meaning to the MOU. [10]

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[10] Although the court of appeals did not elaborate on the statutory limitations on Western's authority to sell the project's power, the court's reference to those limitations (see Pet. App. 10a (quoted at p. 7, *supra*)) provides an independent basis for its holding that the MOU incorporated the two stated purposes that have statutory underpinnings. First, the Reclamation Project Act of 1939, 43 U.S.C. 485h(c), prohibits Western from entering into any power contract that would, in the opinion of the Secretary, "impair the efficiency of the project for irrigation purposes." See *City of Santa Clara* v. *Andrus*, 572 F.2d at 672.

Second, the need for Western to provide for withdrawals for "first preference" entities derives from statutory obligations to customers in the reservoirs' "counties of origin." A 1955 statute, which authorized the CVP's Trinity River Division, provided that customers in Trinity County would be entitled to receive up to 25% of the additional energy available from the

2. Cities nevertheless resort to extrinsic evidence relating to the 1967 amendments in an attempt to buttress their contention that the 1967 amendments provided the absolute exemption from withdrawals that Cities claim they bargained to retain in the 1980 MOU. Pet. 13-24. Both courts below, however, discounted the extrinsic evidence relating to the provision for withdrawals under the 1967 amendments. Pet. App. 13a, 23a, 24a.

Cities contend that the court of appeals improperly ignored what they characterize as admissions in the testimony of Mr. Hine, Mr. Magaw, and others. Pet. 11, 17, 18-19. Yet, the district court did not find that testimony worthy of mention in its Findings of Fact and Conclusions of Law. Pet. App. 22a-30a; cf. *id.* at 13a. It accordingly furnishes no basis for challenging

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CVP system as the result of the construction of the new power plants. See Act of Aug. 12, 1955, Pub. L. No. 84-386, § 4, 69 Stat. 720. A 1962 statute, which authorized construction of the New Melones project, provided a similar first preference for customers in Tuolumne and Calaveras Counties. See Act of Oct. 23, 1962, Pub. L. No. 87-874, § 201, 76 Stat. 1191-1192.

As the court of appeals observed, those provisions limit the amount of electrical power Western can sell. Pet. App. 10a. Moreover, those provisions were part of the public record at the time of the settlement and, therefore, provide a proper basis for resolving facial ambiguities in the MOU. With no showing of a contrary intent on the part of the Secretary, the provisions cited above clarify that the MOU provided for allocations to be subject to the two stated purposes having statutory bases. Additionally, because the Cities' theory ties together the fate of the three stated purposes, no justification remains to exclude the third (contractually based) purpose of preventing the CVP from exceeding its maximum peak load.

the standard of review employed by the court of appeals.

Cities ultimately focus on the text of the 1967 amendments—specifically on the words "curtailed" and "curtailment" in Article 7, which the Ninth Circuit read to provide for withdrawals for the three stated purposes. Pet. 18-24; see note 5, *supra*. Cities contend that the 1967 amendments contemplated "curtailment" in the sense of a temporary pro rata reduction associated with a shortage of supply, as opposed to "withdrawal" in the sense of a permanent reduction of the customer's CRD. See Pet. 18-19, 20-21.

It is not necessary to look beyond the 1967 amendments to see that "curtailed" does not have the constricted meaning Cities impute to it. Article 7(b) of the 1967 amendments refers to curtailment of CRD for the three stated purposes,[11] while the very next

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[11] Paragraph 7(b) of the 1967 amendments provides in relevant part:

> [Palo Alto's allotment shall be increased] until the total firm load of all preference customers reaches a simultaneous demand of 1,050 megawatts. In the event, however, that the power or energy available to serve the total firm load of all preference agencies contracting for power and energy is not sufficient, * * * if necessary said contract rate of delivery shall be curtailed so as not to exceed a prorata share of the total power and energy that is available. The total power and energy available to serve preference agency firm load shall be the power and energy generated at project generating plants that is not required for project operation or for sale either under Section 4 of the Act of August 12, 1955 (69 Stat. 719), or under [the first preference statutes].

paragraph, Article 7(c), promises the customer 90 days' advance notice of the "curtailment" of its CRD and permits the customer, in response, to terminate the contract. Pet. App. 46a-47a.[12]

Cities also disregard the significance of a different provision of the 1967 amendments—Paragraph K of the General Power Contract Provisions—that undermines their interpretation of "curtailment" in Article 7. See Pet. 21. Paragraph K deals with billing adjustments in the event of certain "curtailments to service"; it contains the proviso that "withdrawal of power and energy under the contract provisions shall not be deemed curtailments to service." Pet. App. 36a-37a. The "curtailments to service" in Paragraph K are temporary interruptions to electric service "because of conditions on the power system of the United States." *Id.* at 36a. Those curtailments are not the predicted curtailments of CRD for the three stated purposes in Article 7(b) and (c). The proviso at the end of Paragraph K that "withdrawal of power and energy under the contract provisions shall not be deemed

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Pet. App. 12a-13a, 46a-47a. The court of appeals found this language to constitute an unambiguous recital of the three stated purposes. *Id.* at 13a.

[12] Paragraph 7(c) of the 1967 amendments provides in relevant part:

> In the event the United States must curtail an agreed-upon contract rate of delivery, or the energy associated therewith, it shall give written notice to the Contractor ninety (90) days in advance of the effective date of such curtailment, and the Contractor may terminate this contract within thirty (30) days after receipt of such notice.

Pet. App. 47a.

curtailments to service" recognizes the provisions for withdrawals in the main body of the contract; otherwise, no distinction would have been needed for billing-adjustment purposes between unforeseen "curtailments to service" and anticipated permanent "withdrawal of power and energy under contract provisions." Pet. App. 36a, 37a.

3. Finally, Cities argue that Western's interpretation of "nonwithdrawable" would deprive Cities of their only benefit from the MOU. Pet. 27-30.[13] Both the district court and the court of appeals rejected that contention. See Pet. App. 14a. Cities now acknowledge that it was advantageous for them to be assigned a specific maximum allocation in the MOU. Pet. 28. They take issue, however, with the court of appeals' characterization of their pre-MOU situation (which the assigned allocations remedied) as a "race" among the Cities. Pet. 27 (citing Pet. App. 14a). They insist that "[t]he reference to a race is colorful, but there was no race prior to the MOU, wasteful or

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[13] The Ninth Circuit explained the improvement in Cities' post-MOU situation as follows:

> Foremost among the benefits received under the MOU is each City's ability to grow into its full allotment at its own pace, without the wasteful race to compete for load growth that characterized the previous arrangement. Findings at 15-16. Under *Andrus*, Western had complete discretion to sell all of its power to other preference customers, leaving [Cities] without any CVP power. The MOU spared the [Cities] this unfavorable outcome by granting rights to purchase guaranteed amounts of CVP power, subject only to the same withdrawals for the three stated purposes that characterized all of Western's typical pre-MOU sales contracts.

Pet. App. 14a.

otherwise, among Cities for load growth." Pet. 28. The term "race," however, was coined by Cities' only witness,[14] and the court of appeals' characterization of the advantages derived from the MOU conforms to that of the district court.

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[14] On direct examination, Cities' self-described "principle [*sic*] negotiator," 7/24/90 R.T. at 334, who was Palo Alto's Director of Utilities when the MOU was negotiated, explained that if one city were to attract a large industrial customer because of cheap federal hydroelectric rates, there would be little of the total CVP power left for the other cities. *Ibid.* He testified:

> We were all concerned that we were in a sort of a *race* to use up the available power—I don't want to say that anyone was trying to use power indiscriminately—basically it depended on which city grew faster.

7/24/90 R.T. at 333 (emphasis added). Cities now seek to minimize the MOU's benefit regardless of whether the term "nonwithdrawable" barred exemption from withdrawals for the three stated purposes. But Cities cannot disavow the testimony of their own negotiator.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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HAZEL R. O'LEARY, SECRETARY OF ENERGY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS TO THE BRIEF IN OPPOSITION OF THE FEDERAL RESPONDENTS

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Federal Rules of Civil Procedure:

Rule 52(a) ..... *passim*

REPLY BRIEF OF PETITIONERS TO THE BRIEF IN OPPOSITION OF THE FEDERAL RESPONDENTS

REASONS FOR GRANTING THE WRIT

This is an important case, worthy of the Supreme Court's attention on certiorari, not only because of its general application to appellate review of district court contract interpretations but also because the appellate court violated Rule 52(a) and in the process misinterpreted the 1967 amendments to Petitioners' contracts. Additionally, the appellate court's decision not only adversely affects the Petitioners and their consumers of electric energy but also adversely affects every preference customer's contract with the Western Area Power Administration ("Western"). The appellate court ruled that Western's "legal ability" to sell power is limited by statutory necessity of providing power for project use and the first preference of three Counties[1] consequently, "the MOU . . . accommodate[s] that reality" (Br. 7, 11, n. 10). This ruling, is argued to be "an independent basis" for the appellate court's holding that "the MOU incorporated the two stated purposes that have statutory underpinnings" (Br. 11, n. 10).[2] The effect of the appellate court's finding is to declare unlawful each and every preference customer's power contract because all of the contracts exempt some or all of the allocation from withdrawals (RT 288, 292, 7/24/90; P.Ex. 26, Vols. I and II). Thus, it is of

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[1] By statute (Pet. App. 31a and 33a) these counties have a preference of up to 25 percent of the power generated by certain plants. By statute the only power that Western may sell to preference customers is power surplus to project use.

[2] The Federal Respondents make this argument although they concede the appellate court's determination is devoid of any supporting reasoning. They offer as a substitute their views as the underpinnings for the appellate court's bare conclusion. That does not alter the fact that the appellate court's determination is unsupported. Petitioners' showed (Pet. 25-26) that the appellate court's determination of "statutory limitation" on Western authority to exempt allocations from withdrawal was flatly rejected by Western's witness Magaw (RT 181-182, 7/23/90). Nothing in the statutes cited by the Federal Respondents deprive Western of its discretion to exempt allocations from withdrawals (Pet. App. 31a and 33a).

utmost importance that the appellate court's decision be reviewed to remove the cloud on all allocations of the preference customers.

Beyond that, this case also merits review by the Supreme Court for the appellate court's violation of Rule 52(a) (Pet. 7-8), which permits a grievous breach of contract by a Government agency. Also, the appellate court's violation of Rule 52(a) signals a need for re-emphasis of the importance of adherence to the strictures of Rule 52(a) as enunciated by this Court.

In arguing against certiorari (Br. 9) the Federal Respondents ignore this Court's admonition in *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518 (1985), that the question is not whether an appellate court's findings of fact (the appellate court did make findings of fact in support of its interpretation) are "clearly erroneous" (as they are and as are its legal conclusions) but, rather, whether the *district court's findings of fact are clearly erroneous.* 470 U.S. 577, 84 L.Ed.2d at 530.

The Federal Respondents also ignore that while the appellate court ruled that "nonwithdrawable" was ambiguous, it recognized at the same time that although interpretation of a contract under California law is a question of law, the interpretation involves "a complex interplay of questions of fact and questions of law" and that the trial court's findings of fact themselves involved in that "complex interplay" are reviewed under the "clearly erroneous standard" (Pet. App. at 9a).

While declaring "nonwithdrawable" ambiguous (which ambiguity required consideration of extrinsic evidence, and, affirmance of the district court's decision), the appellate court did not rule on the district court's findings of fact upon which its conclusions of law rested. The appellate court's opinion is silent as to any erroneous (clear or otherwise) findings of the district court, other than to boldly

declare "nonwithdrawable" as ambiguous.[3] Given this, how the Federal Respondents can assert that this case does not present an issue regarding the necessity of appellate court's to comply with the strictures of Rule 52(a), defies understanding.

Moreover, on the basis of the evidentiary record, the district court's findings of fact on which it based rejection of Western's contention that "nonwithdrawable" was a "term of art", the district court's conclusions are correct, are not erroneous, and should have been affirmed. The district court's determinations include that if the use of "nonwithdrawable" were ambiguous, under California law the interpretation goes against the party responsible for the ambiguity, namely, Western, which responsibility Mr. Hine, its witness and General Counsel, acknowledged (RT 15, 16, 7/20/90).

The Federal Respondents assert, in defense of the appellate court's concentration on the 1967 amendments to the exclusion of the district court's findings and conclusions relating to the basic affirmative positions advanced by Western in support of its position on the meaning of "nonwithdrawal", that the "parties agreed that the meaning of the term 'nonwithdrawable' should be resolved by reference to the 1967 amendments", citing to a sentence from the district court's decision about both parties "relying" on their respective interpretations of the amendments (Pet. App. 25a). Petitioners did rely on the 1967 amendments, regarding them as important evidence that "nonwithdrawable" meant not subject to withdrawal for any reason. But

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[3] Federal Respondents admit that the district court did not mention two findings of the district court addressing the meaning of "nonwithdrawable" as used in the settlement agreement, having ruled that the meaning of the 1967 amendments was inconclusive (Br. 9-10, n. 9). Federal Respondents assert that "[t]here is no indication that the court of appeals failed to weigh properly these factual conclusions." (Br. 10, n. 9). This declaration of faith does not overcome the fact that the appellate court focused solely on the 1967 amendments. Declaring "nonwithdrawable" ambiguous it ignored the district court's findings of fact and conclusions therefrom.

Petitioners' did not rely on the 1967 amendments to the exclusion of all else. Had Petitioners relied solely on the 1967 amendments, there would not be the evidence on which the district court's findings of fact and conclusions of law rest.

ARGUMENT

I.

The Federal Respondents would have this Court believe that "nonwithdrawable" was in use since 1963 to describe allocations in fact subject to withdrawal such as Cities' 1963 allocations, which were subject to withdrawal for project use and the first preference of Trinity County, by describing Cities' 1963 allocations as "long-term nonwithdrawable" allocations (Br. 2, 3, n. 2). The record shows, and the district court found, which finding is unchallenged, that "nonwithdrawable" was never used to describe the contracts or allocations. The Federal Respondents would also have the Court believe that "nonwithdrawable" was used by Santa Clara in its complaint in its 1975 lawsuit. Santa Clara did not use that term (P.Ex. 17). Western used that term in response to the complaint as meaning "firm" and the Ninth Circuit in *Andrus* (*Santa Clara v. Andrus*, 572 F.2d 660), adopting Western's definition of the term, also used it as meaning "firm" (572 F.2d at 663; RT 177, 7/23/90). The appellate court in this case concedes (Pet. App. 6a) that the Santa Clara litigation did not use "nonwithdrawable" as meaning subject to withdrawal for the three purposes.

Next, Federal Respondents state that non-parties to the settlement agreement would bear the entire burden of withdrawals if Cities' position were upheld (Br. 4, n. 3). This is also misleading. Three other contracts are not subject to withdrawal for any reason (SMUD's 290 MW; Arvin Edison's allocation, Reclamation 2035's contract); SMUD's 70 MW, and all other allocations are exempt from withdrawals for Calaveras and Tuolumne Counties (RT 129-131, 134-135, 7/19/90; 1-3, 7/20/90; 20 7/23/90; 296, 318, 7/24/90; P.Exs. 26 (Vols. I and II); 33, p. 33319, RT 287; 36; 38; 51).

Federal Respondents also state, without citation to the record, that the parties "agreed" that the settlement preserved the kind of allocation that Cities had at the time of the settlement. There was no such "agreement", or even "suggestion" (Br. 11). Nor did Cities and the district court concentrate solely on the 1967 amendments (Br. 5) as the evidentiary record and the district court's decision show.

Finally, the Federal Respondents imply that the district court's findings that the 1967 amendments are "reasonably subject to both interpretations" and that "the extrinsic evidence regarding the [the nature of] the 1967 amendments" is inconclusive with respect to withdrawals, are in conflict with the district court holding that " 'nonwithdrawable' clearly and unequivocally meant" not subject to withdrawal for any reason (Br. 5-6). There is no conflict. The district court's findings and conclusions based on the evidence which rejected Western's affirmative positions in support of its interpretation, such as that the word was a "term of art" meaning subject to withdrawal for the three stated purposes, are supported by the evidence.

II.

The Federal Respondents explain the appellate court's disregard of any extrinsic evidence relating to the 1967 amendments on the ground that the appellate court found the provisions to be unambiguous (Br. 11). Federal Respondents apparently have overlooked, or refuse to credit, the appellate court's statement that "(t)here is no relevant extrinsic evidence in the record that could alter the meaning of the 1967 amendments." (Pet. App. 13a). In pages 13 to 24 of the Petition, petitioners show that the extrinsic evidence with respect to the 1967 amendments does contradict the appellate court's interpretation and does so overwhelmingly.

Cities find it impossible to believe that the appellate court, to single out only one contradictory piece of evidence, did not consider the exchange of correspondence between the Regional Director of the Sacramento Office of the Bureau

and the Bureau's Commissioner in Washington regarding the establishment of procedures for withdrawal of "short term" allocations as not contradicting its interpretation of the 1967 amendments[4] (P.Exs. 39, 40, 41).

Palo Alto (in 1966) and Plumas Sierra (in 1965) sought and received short term allocations of 11 MW and 2 MW, respectively, to meet their load growth requirements, pending consummation of the agreement between the load growth customers (Cities & Shasta) and Bureau relating to its commitment, made in 1964, and memorialized in the 1967 amendments, to provide their load growth. The Regional Director in his 1966 letter proposed the establishment of a priority system under which Palo Alto and Plumas would be the last to be withdrawn because:

> "As it was intended to carry the load growth of these customers as a result of the additional power made available to Central Valley Project from the Intertie, we recommend these allocations . . . be preserved to the maximum extent possible."

The Commissioner, in a 1966 response, deferred the establishment of withdrawal procedures until some variables were resolved and the situation stabilized. In 1968, *subsequent to the 1967 amendments*, the Regional Director revived the subject. Referring to the earlier exchange (P.Exs. 39, 40), he noted that since 1966 a new contract with PG&E has been signed (Contract 2948A, in 1967, P.Ex. 42) and that some of the variables had been resolved. Listing Cities' and Shasta's current contract rates of delivery, he noted that

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[4] The Federal Respondents state (Br. 11) "that the court of appeals held that the 1967 amendments unambiguously used the term 'nonwithdrawable' to subject allocations for the three stated purposes" to withdrawal, citing Pet. App. at 13a. The appellate court did not hold that the 1967 amendments used "nonwithdrawable". Pet. App. 13a, refers to its opinion where it quotes the provisions of the 1967 amendments. The word "nonwithdrawable" or any form of that word, does not appear, nor does "withdrawable" or any form of that word. What does appear in a footnote is only "curtailment", which is not synonymous with "nonwithdrawable" and does not have the same practical effect as mistakenly claimed by the appellate court (Pet. App. 13a, n.4; Pet. 18-21).

amendments to existing contracts of these customers, except for Shasta, had been signed (the 1967 amendments). He continues:

> "These amendments include a commitment by the United States to serve the load growth of each of these customers to the level which each reaches in 1980 or to a pro rata share of the total available if all customers exceed 1,050 megawatts of maximum simultaneous demand. *This commitment would exclude those above-mentioned municipalities and cooperatives from any procedures established for withdrawal of short term power.*" (p. 2; emphasis supplied)

He proposed a new withdrawal procedure in which—

> "all our preference customers, *with the exception of the municipalities and cooperative mentioned earlier*, be subject to withdrawal based on a pro rata percent reduction of the individual withdrawable allocations." (emphasis supplied).

Here is the Regional Director in whose office the 1967 Amendments were prepared (RT 16, 7/23/90, Western Witness Hood), in a contemporaneous interpretation—unrelated to the existence of any controversy regarding the meaning of the 1967 amendments—recognizing that the commitment to provide the load growth of Cities means that the load growth customer's allocations are exempt from withdrawal so that their "short term" allocations, which were subject to withdrawal because made from power previously allocated to other preference customers but unused, would now not be subject to withdrawal, having been converted to "nonwithdrawable" status by the 1967 amendments.

Western witness Magaw testified on cross-examination with respect to Palo Alto's and Plumas Sierra's "short term" allocations that they were "subsumed within their load growth amendments made subsequent to that" (RT 285, 7/24/90). Asked to explain "subsumed", he explained (id.) "if they had withdrawable allocation at the time, and subsequent to that they were given load growth allocations

which were firm, depending on their load growth at the time, my feeling would be that they were no longer withdrawable and therefore subsumed to the load growth contract." In short, the allocations of the "load growth" Cities, by reason of the commitment to provide their load growth, reflected in the 1967 amendments, were not subject to withdrawal, as Petitioners have contended. The appellate court's interpretation is wrong.

The Federal Respondents assert that "curtailment" does not have the "constricted" meaning imputed to it by Cities, because Article 7(b) of the 1967 amendments "refers to *curtailment* of CRD for the three stated purposes, while the very next paragraph, Paragraph 7(c), promises the customer 90 days' advance notice of the '*curtailment*' of its CRD and permits the customer, in response, to terminate the contract." (Br. 13-14; emphasis supplied). How that either shows that "withdrawal" for the three stated purposes are authorized or that "curtailment" does not mean a temporary *pro rata* reduction of deliveries, or shows that "curtailment" means "withdrawable" escapes Petitioners. The Federal Respondents offer no explanation and they cannot.

Article 9(b) (Pet. App. 46a-47a) defines "total power and energy available" to serve Cities. The definition does not include power for project use and the first preference of each of the three counties. Since the power for the preference entities in the three counties are not included, it follows, as night follows day, that curtailment of the "total power and energy" due to a shortage, does not involve any power of the preference customers in the three counties. The provision described by the appellate court as "a straightforward recital of the three [two] stated purposes" is just that (material in brackets supplied). It does not authorize "withdrawals", assuming, *arguendo*, "withdrawal" is "curtailment". The appellate court's second guessing of the district court on the meaning of the 1967 amendments missed the mark.[5]

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[5] Note that the Federal Respondents nowhere in their brief in oppo-

Furthermore, the evidence shows Western serves the first preference customers from capacity available under the 1152 load level, namely, from the 102 MW increase in Pacific Gas and Electric's ("PG&E") support obligation under Contract 2948A (P.Ex. 33, p. 33315, RT 283) and not from power at the 1050 MW level. Western withdraws power to serve the first preference customers in Calaveras and Tuolumne Counties only "as a result of an 1,152 load level withdrawal". (P.Ex 33, p. 33316, RT 281). In 1967 when the load growth amendments were made there was no additional 102 MW and a 1152 load level. The maximum load level for Cities is 1050 MW. It is from that load level that Cities are served. This is an example of another contradiction of the appellate court's interpretation of the 1967 amendments by extrinsic evidence.

The Federal Respondents in attempting to avoid the consequence of Paragraph K of the General Power Contract Provisions which explicitly provides that "curtailments" shall not be deemed "withdrawals", actually concede that "curtailments" are not "withdrawals". Respondents argue (Br. 14) the "curtailment of service . . . of temporary interruptions to electric service . . . because of conditions on the power systems of the United States that Paragraph K deals with "are not the predicted *curtailments* of CRD for the three stated purposes in Article 7(b) and (c)." Respondents say that the proviso that warns that "curtailments" shall not be deemed "withdrawals" means there are provisions in the contracts that authorize withdrawals, otherwise, there was no need to *distinguish* "curtailments from withdrawals". Thus, Respondents concede that "curtailments" are not "withdrawals" and that the use of these different terms,

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sition defend the court's erroneous interpretation of the sentence (Pet. App. 12a) that merely states Western's obligation under the 1967 amendments to provide Cities' load growth as a provision authorizing withdrawals for load level protection. They also ignore Cities' showing that the same provision relied on by the appellate court appears in 20 contracts. That the contracts include express provisions for withdrawals for project use and Trinity County. If the provision relied on by the appellate court were authority for withdrawal, the express provisions would not be there (Pet. 21-23).

with their difference consequences (curtailments are temporary; withdrawals are permanent), is not an inadvertence (Pet. 21-23). Finally, this analysis by the Federal Respondents assumes every contract has withdrawal provisions, but, as shown, that is indisputably not the case, and Paragraph K is in each contract.

III.

Finally, addressing Cities' arguments that the appellate court's decision deprives Cities of the only benefit of the settlement, i.e., a specific allocation of power to each of Cities, the Federal Respondents say that "Cities *now* acknowledge that it was advantageous for them to be assigned a specific maximum allocation in the MOU." (emphasis supplied.) The benefit of specific allocations for each of Cities had been explicitly expressed by Cities during the settlement negotiations. It was the *raison d'etre* for Cities relinquishment of the valuable 65 MW to Santa Clara. This has been Cities' constant position. The specific allocations were its only benefit of which it is deprived.

The Federal Respondents do not challenge, and cannot challenge, Cities' showing that the other benefits to Cities of the settlement erroneously claimed by the appellate court are non-existent, such as the legally absurd claim that Western could have taken away all of the Cities' allocations, based upon the appellate court's misinterpretation of the *Andrus* decision.

CONCLUSION

Petitioners in this reply brief have been able to bring into sharper focus the grievous wrong that has been done to Petitioners by the appellate court's erroneous second guessing, and the persistence with which Western, the principal Respondent, seeks to preserve a decision of the appellate court which is demonstrably wrong, violates Rule 52(a), and is in conflict with decisions of the panel's own Circuit and of this Court.Petitioners submit that this case is a certiorari worthy case and that summary reversal of the appellate court is appropriate.

Respectfully submitted,

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